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SUPREME COURT, U.S.

In the Supreme Court of the United States
October Term, 1956

No. ~~1116~~ 216

Nuodex Products Co., Inc.
Defendant, Petitioner

v.

W. H. Elliott & Sons Co., Inc.
Plaintiff, Respondent

No. .....

Nuodex Products Co., Inc.,
Cross-defendant, petitioner

v.

E. & F. King & Co., Incorporated
Cross-claimant, respondent

Petition For Writ of Certiorari

Submitted by
George B. Rowell
WARNER STACKPOLE STETSON & BRADLEE
84 State Street
Boston, Mass.
Frank J. Sulloway of
SULLOWAY HOLLIS GODFREY and SODEN
3 Capitol Street, Concord, N. H.
and
Gordon M. Tiffany of
TIFFANY and OSBORNE
88 North Main Street, Concord, N. H.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the First Circuit

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

Your petitioner, Nuodex Products Co., Inc., a New York corporation, respectfully prays that a writ of certiorari be issued to review certain judgments hereinbelow of the United States Court of Appeals for the First Circuit entered March 26, 1957.

(a) OPINIONS BELOW

The opinions entered by the Court of Appeals on the judgments herein petitioned to be reviewed are unreported at the time of printing hereof but are reproduced below in Appendix A beginning at page 43. These Court of Appeals judgments reversed two judgments of the District Court for the District of New Hampshire duly entered April 18, 1956 and October 25, 1956 in its case No. 1465, the opinion in which was reported at 144 F. Supp. 401. The District Court opinion is reproduced in Appendix B hereof beginning at page 57.

A duly certified transcript of the record of the case, including the proceedings in the Court of Appeals as well as in the District Court, is transmitted herewith in accordance with the Rules of this Court.

---

[1] The several sections of this Petition are lettered to correspond with the requirements of a Petition for Certiorari as set forth in Rule 23 of Revised Rules of the Supreme Court of the United States effective July 1, 1954.

(b) GROUNDS OF JURISDICTION

The judgments herein petitioned to be reviewed were entered by the United States Court of Appeals for the First Circuit on March 26, 1957 (R 372).

Motion to stay the mandate of the Court of Appeals pending Petitioner's application to the Supreme Court of the United States for a writ of certiorari was duly filed in the Court of Appeals, and was granted by it on April 9, 1957 (R. 373).

Jurisdiction is conferred upon the Supreme Court of the United States to review the judgment of the Court of Appeals herein by 28 U.S.C. §1254 (1).

(c) QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the District Court's finding that plaintiff's claim had no connection with any local contact or activity of the nonresident corporate defendant, and in predicating such a connection upon Nuodex' registration of its product, Super Ad-it with the New Hampshire Commissioner of Agriculture under the Economic Poisons Law of the State.

2. Whether under the "due process" clause of the Fourteenth Amendment the Court of Appeals erred in finding Petitioner's contacts with New Hampshire sufficient to sustain the jurisdiction of the District Court as to its person in view of the undisputed evidence and clear weight of the evidence as to the tenuous and insubstantial "quality and nature" of these contacts, their occasional and fleeting occurrence, and the insignificant extent

* The following designations will be used herein to refer to the certified copy of the record below and to the several record appendices of the various parties in the Court of Appeals:

R—Refers to Certified Copy of Record Appendices and Proceedings Below;

PRA—Refers to Plaintiff-Appellant's Record Appendix filed in Court of Appeals;

CCRA—Refers to Record Appendix of Cross-Claimant, Appellant, King in Court of Appeals;

CRA—Refers to Consolidated Record Appendix Submitted jointly by Plaintiff, Appellant and Cross-Claimant, Appellant in Court of Appeals;

DRA—Refers to Consolidated Record Appendix of Defendant and Cross-Defendant, Appellee, Nuodex, in Court of Appeals.

of Petitioner's local business (*International Shoe Co.* v. *Washington*, 326 US 310 at 319, 320, 90 L. Ed. 95 at 104 (1945).

3. Whether the New Hampshire jurisdiction statute with respect to foreign corporations extends local jurisdiction over them to the outermost limits of federal due process if those limits are to be construed by standards more expansive than those put upon the doctrine of *International Shoe Co.* v. *Washington* by the Supreme Court of New Hampshire.

(d) CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The United States Constitution, Amendments, Article XIV, §1
Supreme Court jurisdiction statute (28 U.S.C. §1254)
The federal diversity statute (28 U.S.C. §1332)
The federal venue statute (28 U.S.C. §1391)
The Federal Rules of Civil Procedure, Rule 4 (d) (3) and 4 (d) (7)
The New Hampshire statute for service of process on foreign corporations (RSA 300:11)
The New Hampshire Economic Poisons Law (RSA 438:1-17)

For texts of foregoing, see Appendix C, *infra*, beginning at page 67.

(e) (g) STATEMENT OF THE CASE

The proceedings below. This is a petition for two writs of certiorari to review judgments of the Court of Appeals for the First Circuit in two companion cases in which that Court vacated two orders of the District Court of New Hampshire by which the District Court had quashed the return and dismissed the action and cross-claim herein as to the nonresident corporate defendant, Nuodex (the petitioner herein), on the ground that such defendant was not subject to the Court's jurisdiction. The underlying case is a civil action by W. H. Elliott & Sons Co., Inc., a New Hampshire corporation (sometimes hereinafter referred to as Elliott) against two foreign manufacturing corporations, E. & F. King & Co., Inc., a Massachusetts corporation (herein-

after sometimes referred to as King) and Nuodex Products Co., Inc., a New York corporation (hereinafter sometimes referred to as Nuodex). Jurisdiction was asserted in the District Court upon the basis of diversity of citizenship, and service was purportedly had upon the nonresident defendant corporations by service upon the Secretary of State of The State of New Hampshire. The complaint alleges both negligence (Count 1, R 6; PRA 6) and breach of warranty (Count 2, R8; PRA 8) as bases for plaintiff's right to recover against each defendant for damages claimed to have been suffered by it in New Hampshire as a result of its purchase and use of an alleged defective greenhouse paint manufactured by King in Massachusetts containing an alleged improper ingredient supplied to King by Nuodex. There is no claim that Nuodex' sale of this ingredient to King bore any relation to New Hampshire.

Both defendants filed motions to dismiss the complaint for jurisdictional reasons pursuant to Rule 12 (b) of the FEDERAL RULES OF CIVIL PROCEDURE (R 11, 67; PRA 11, DRA 1), but on October 20, 1955 King waived its motion without hearing thereon and filed its answer admitting jurisdiction (R 11; PRA 11). At the same time King filed a cross-claim against Nuodex (R 13, PRA 13). Nuodex seasonably moved that this cross claim in turn be dismissed (R 57; CCRA 3). After a four-day hearing supplemented by two depositions the Nuodex motions were sustained, and orders were entered dismissing the action on April 18, 1956 (R 52, PRA 52) and the cross action on October 25, 1956 (R 349; CRA 7). On October 25, 1956 the District Court also entered orders under Rule 54 (b) that there was no just cause for delay in review of the two orders of dismissal (R 348, 350; CRA 6, 8). Thereafter on October 27 and November 1, 1956 plaintiff and cross claimant respectively filed Notices of Appeal (R 349 350; CRA 7, 8) and these appeals were heard by the Court of Appeals for the First Circuit on November 7, 1956. On March 26, 1957 the Court of Appeals entered its judgment reversing the judgment of the District Court (R 372). This order was accompanied by the filing of three separate written opinions, one by each of the three judges of the Court of Appeals who had heard the arguments (R 355; Appendix A *infra*, page 43 *et seq.*)

The material facts. The basic evidentiary facts bearing upon

the issues herein before the Court are subject to little dispute. There is, however, some variation among the parties and the several judges of the two courts which have reviewed the evidence as to the manner in which these facts may properly be characterized and labeled. In this statement, therefore, we shall endeavor to summarize the facts primarily in terms of basic evidence with a minimum of characterization.

Plaintiff is the proprietor of certain greenhouses in Madbury, New Hampshire, and this action is brought by it to recover for certain damages allegedly incurred as a result of its use in them of No. 1004 Greenhouse White paint manufactured by King, a Massachusetts manufacturer, and purchased by plaintiff from King. This paint allegedly incorporated as an ingredient Nuodex' product, Super Ad-it. There is no evidence which in any way connects any local activity of Nuodex in New Hampshire with Elliott's purchase of King's paint.

King admits that its sale of paints and putties to New Hampshire customers were $37,000 in 1953 and $44,000 in 1954, and that to promote and serve its New Hampshire business it at all times material hereto had both a salesman and a specialist regularly assigned there. (R 40; PRA 40). The evidence is uncontradicted that this paint was sold as E. & F. King paint (R 43; PRA 43) and that neither Nuodex nor its New England sales representative, Litter, had anything to do with procuring any sales of King products in New Hampshire. (R 41, 81; PRA 41; DRA 15). There is no evidence that plaintiff was even aware that Nuodex' product was included in the paint formula until after the harm occurred.

The defendant petitioner, Nuodex Products Co., Inc., is a New York corporation (R 85; DRA 19) which is engaged in the manufacture of certain chemical products in the vicinity of metropolitan New York and also at Long Beach, California (R 74; DRA 8) which it sells primarily to industrial consumers (R 75; DRA 9). It has, and has had, no plant, bank accounts or

This was the finding of the District Court (Appendix B *infra*). The Court of Appeals reversed this finding on the ground that such a connection existed by virtue of Nuodex' registration of Super Ad-it under the New Hampshire Economic Poisons Law (Appendix A, and see Part I of Argument *infra* in which we believe that we show that the statutory construction of the Court of Appeals on this point is conclusively erroneous).

other property, office, telephone listing, nor resident employees agents or representatives of any sort in The State of New Hampshire (R 84, 85, 100; DRA 18, 19, 100). No stocks of Nuodex goods are maintained in New Hampshire, and all sales are completed outside of the State (R 84; DRA 18). There is no evidence that Nuodex conducts or has ever conducted any regular or other corporate activities in the State (See R 103-105; DRA 97-99). Although it has registered to do business in the Commonwealth of Massachusetts, (R 88; DRA 22), it has never registered to do business in The State of New Hampshire and has appointed no agent there to receive service of process (R 85; DRA 19). Over the entire five year period of the record, it appears that only one Nuodex employee ever came into New Hampshire on business of the corporation. This was on the single date, April 8, 1953, more than two years before the complaint herein and in a matter wholly unrelated to it (R 103-105, 220; DRA 97-99, 154).

Nuodex' annual sales volume during the five years preceding the complaint varied between $9,500,000 and $8,000,000 (R 107, DRA 101). During this time its sales volume into The State of New Hampshire, moving through the channels of interstate commerce, varied from something in excess of $800 in 1951 to somewhat less than $3,500 in 1954. (Nuodex' Exhibit C, R 310; DRA 244; adjusted for testimony at R 283-285, 290-292; DRA 217-219 and 224-226). This was perhaps "two or three hundredths of a per cent of Nuodex' total sales." (R 107; DRA 101).

Nuodex does not, as a regular corporate activity, engage in direct customer solicitation in behalf of its products, and it has not done so in New Hampshire (R 75, 82; DRA 9, 16). Instead it has turned over the task of personal sales promotion and direct customer solicitation to seventeen independent manufacturers representatives in different areas of the country (R 75; DRA 9) and in its own organization it employs simply six regional sales managers (R 76; DRA 10) whose responsibility is essentially to see that the total results achieved in their respective territories are satisfactory (R 83, 119; DRA 17, 53).

D. H. Litter Company, Inc. (hereinafter sometimes referred to as Litter), a New York corporation having its main office in New York City and a branch office in Allston, Massachusetts (R 263; DRA 197) is Nuodex' sales representative for its New England territory (R 82; DRA 16). This territory includes

Maine, New Hampshire, Vermont, Massachusetts, part of Connecticut and part of New York (R 162; DRA 96). Litter receives compensation from Nuodex for its promotional efforts in the form of a five per cent commission on all sales of Nuodex products in the New England territory (See Nuodex-Litter representation contract, Plaintiff's Exhibit 2 at R 308-309; DRA 242-243). No one other than Litter personnel promotes Nuodex sales in New Hampshire (R 82; DRA 16).

Nuodex and Litter are distinct corporate entities. Nuodex has no financial interest in Litter (R 82; DRA 16), nor any control over it (R 82, 112, 166; DRA 16, 46, 100). Litter's customer call reports are its own internal company documents and Nuodex receives no copy of them (R 229; DRA 162). In addition to representing Nuodex, Litter also represents seven other manufacturers (R 82-83, 114; DRA 16-17, 45), and its business for them in New Hampshire is much greater than that for Nuodex (R 112; DRA 46).

The sole activity of Litter in behalf of Nuodex in New Hampshire has been a limited amount of direct customer solicitation and sales promotion (R 75-76, 286, 308-309; DRA 9-10, 200, 242-243). With the exception of two such visits to New Hampshire by one Cookingham (R 280; DRA 214), his only two visits to this State since he became Litter's Boston manager in 1958 (R 222; DRA 156), the only Litter employee who occasionally has solicited for Nuodex in New Hampshire is one Herbert Johnson (R 105; DRA 39) whose residence is in Andover, Massachusetts (R 89; DRA 23) and whose assigned territory for Litter includes southern New Hampshire, Vermont, Eastern New York State, Massachusetts north and west of Boston and western Connecticut. (R 113; DRA 47).

Under Litter's regular corporate practice, its soliciting personnel make a record of each call upon an account or prospect in the form of a so-called "call report." There is reproduced in the transcript the complete text of each of Johnson's call reports for the period in excess of five years from March 20, 1950 to May 5, 1955 upon any New Hampshire prospect or account to which at any time he mentioned Nuodex or its products. (R 313-328; DRA 247-262). The following report of a call on Nashua Corporation for September 22, 1953 is a sample which is illustrative of the nature of these reports:

Nashua Corp. 9-22-53

* * * *

Saw Mr. J. C. Tuttle—APA
Use Toluol (2000 mo.), Xylol (4000 mo.) and Textile Spts (will increase) all in drums. Putting in Tank form for T. T del. Wants second source. OK Will del. gal. samples of Toluol, Xylol, Super Petrolene, Super Troluoil and send data and price information.

Order Alcoa 552, Nuodex 84 and K-1717 as needed.

(R 322; DRA 256).

Only the words, "Nuodex 84," in this entire report indicate that the call was in some slight degree in the interest and behalf of this manufacturer. Examination of the entire file of reports will reveal that the foregoing is not untypical, and that as a general matter Johnson's activities in behalf of Nuodex in New Hampshire were essentially casual and incidental to his promotion activities with respect to Litter's more substantial accounts (See the reports at R 313-328; DRA 247-262, and testimony of Johnson at R 226-255, 259, 277-278; DRA 160-189, 193, 211-212. The names of Nuodex' products are listed in its Standard Products Price List, reproduced facing R 312; DRA 240). In appraising Johnson's testimony concerning these calls it is significant to note the repeated admonition of plaintiff's attorney that the witness respond to questioning solely in terms of Nuodex because he was "not concerned" with Litter's business for other manufacturers (R 91-92, 229, 241; DRA 25-26, 163, 175).

That Johnson's representation of Nuodex in New Hampshire was casual and incidental is also strongly indicated by certain financial data. Johnson testified that Nuodex' share of Litter's total New Hampshire business was small (R 112; DRA 46). How small it was can be readily established. Computed on the basis of five per cent of Nuodex sales into New Hampshire (Defendant's exhibit C at R 310; DRA 244), Litter's aggregate commissions on sales of Nuodex products in New Hampshire over the entire five-year period were $407.32, or an average of approximately $80.00 per year. Manifestly, business in the entire jurisdiction of this order of magnitude neither reflects, nor

[1] Denotes omitted caption

would justify any substantial travel or time of soliciting personnel.

Johnson's call reports also provide a record of the frequency, or lack of frequency, with which he was present in New Hampshire in some way promoting the interest of the nonresident defendant. Thus, the reports show that although Johnson made a number of calls in this State between December 16, 1953 and July 13, 1954 (R 322-325; DRA 256-259), during this entire seven-month period he made no single call in which Nuodex or any of its products was promoted. Over the five years of the call report record, Johnson appears to have mentioned Nuodex or its products to New Hampshire prospects or customers on a total of at most thirty-two different days. If it be assumed that Johnson spent the whole of each of these working days in New Hampshire (which is almost certainly not the case) and that his total time throughout each day was equally divided among the products of each of the eight different manufacturers represented by Litter, it would result that *over the entire period of this record Johnson spent the equivalent of four working days for Nuodex in the jurisdiction. This is an average of less than one day in the State each year.* Even if the premise of the foregoing estimate be doubled on the theory that the call reports support the hypothesis that on these days Johnson devoted one-quarter of his sales efforts to the interests of this manufacturer, the result would be a total of only eight equivalent working days in the jurisdiction over the five-year period, or still an average of less than two working days there for Nuodex each year.

Among Nuodex products since 1950 has been a paint additive to inhibit the development of paint mildew (R 186; DRA 120). The original product was designated as Ad-it, but in 1952 this was succeeded by a new formula designated as Super Ad-it, (R 186; DRA 120) which is the paint ingredient complained of in this action. Prior to 1954 Super Ad-it was sold through Nuodex' regional sales representatives to paint manufacturers

1950: March 20, May 4, June 14, August 16, September 27;
1951: May 10, August 20 and 21, October 15 and November 20;
1952: February 26, June 11, July 10 and August 20;
1953: February 10, March 9 and 26, May 28, June 3, July 7, August 13 and 31, September 22, November 10 and December 16;
1954: July 13, September 22, October 5 and November 1;
1955: January 4 and 12, March 17

such as King and to certain of their designated distributors in prepackaged bottles for distribution to the ultimate consumer as well as in bulk for use by paint manufacturers in paint formulas. In the spring of 1954 Nuodex entered into an arrangement with Doggett-Pfeil Laboratories, Incorporated, a distinct corporation in which Nuodex has no ownership interest and over which it has no control (R 176-177, 191, 205; DRA 110-111, 125, 139) whereby the latter acquired the exclusive right to sell prepackaged Super Ad-it (R 177; DRA 111 and extracts from plaintiff's exhibit 19 at R 311-313; DRA 245-247), purchasing the product in bulk from Nuodex and repackaging it in small bottles. Nuodex itself has continued to sell the product in bulk.

There is no evidence that Nuodex ever sold either Ad-it or Super Ad-it in bulk to any New Hampshire customer. Prior to the Doggett-Pfeil contract Nuodex made two or three isolated sales of a half dozen bottles or so each of the prepackaged product to New Hampshire customers (R 139, 188-190, 278, 282-283; DRA 73, 122-124, 212, 216-217), but there is no evidence of any such sale since. Neither is there evidence of any such sales to New Hampshire accounts directly by Doggett & Pfeil.

The record discloses the following additional facts. Nuodex has a card file mailing list of possible customers to which it occasionally sends out promotional materials. This file includes twenty-eight drawers, each eighteen inches deep, filled with cards, but only ten cards in the entire file bear New Hampshire addresses and one of these is no longer active (R 149, 160-163, 293-295; DRA 83, 94-97, 227-229).

Nuodex admits that it advertises periodically in several nationally circulated trade journals (R 145, 156-157; DRA 79, 90-91) but it has never engaged in local advertising of its products in The State of New Hampshire (R 145, 266; DRA 79, 200). From time to time it has received at its offices outside of the State of New Hampshire correspondence and inquiries from possible New Hampshire accounts. It is admitted that Nuodex has answered this correspondence and that from time to time it has sent samples of its products to New Hampshire prospects. Nuodex further admits that it has registered its products which require registration under the Economic Poisons Acts of all of the states (R 192; DRA 126), including the relevant statute of The State of New Hampshire (New Hampshire RSA 438, repro-

duced in Appendix C *infra* at 70-80.) It has done this because it believes that its ". . . customers such as Sears are apt to sell in any state, and we want to protect our customers" (R 192; DRA 126).

The foregoing recapitulation sets forth the major facts upon which the issue of jurisdiction herein must turn. In truth, there is and has been little real dispute among the parties on these matters, the issues having rather been drawn between them as to their jurisdictional significance or want of significance. Upon a correct application of legal authority, Petitioner respectfully submits that the Supreme Court will find that the judgments of the Court of Appeals sustaining jurisdiction over petitioner herein should be reversed and that the order of the District Court quashing the return and dismissing the action should be reinstated. We turn now to state to the Court the reasons why Petitioner believes writs of certiorari should be allowed herein.

(h) ARGUMENT

Introductory

This Argument is respectfully submitted for the purpose of setting forth the reasons relied upon by Petitioner for allowance of writs of certiorari herein. We do not conceive it to be the function of a Petition for Certiorari to develop a conclusive case as to the error of the judgment of which review is sought. While we believe that we show herein that such error occurred, we defer full Argument to this effect until such time as a brief upon the merits of the jurisdictional question herein at issue may be in order.

I. THE COURT OF APPEALS HAS COMMITTED A SERIOUS ERROR IN CONSTRUCTION OF AN IMPORTANT STATE STATUTE IN FINDING A CONNECTION OF JURISDICTIONAL SIGNIFICANCE BETWEEN PLAINTIFF'S HARM AND NUODEX' REGISTRATION OF SUPER AD-IT UNDER THE NEW HAMPSHIRE ECONOMIC POISONS LAW.

§ 1. Nature of Error.

The District Court decision that it was without jurisdiction as to the person of the petitioner herein was based in large

measure upon its finding that the injury complained of was in no way connected with any activity by or for petitioner in The State of New Hampshire. For the Court conceived it to be an essential element of the *International Shoe*[6] doctrine of state jurisdiction over a foreign corporation, particularly as that doctrine is conceived and applied by the Supreme Court of New Hampshire, that there exist a relation between the subject matter of the claim and some local contact of the foreign corporation. (Appendix B *infra* at 57.) In the Court of Appeals both Judge Hartigan and Chief Judge Magruder recognized that in the context of all of the facts of this case it was important to the existence of local jurisdiction over petitioner that a connection exist between local activity by or for petitioner in New Hampshire and the facts giving rise to plaintiff's claim. But each believed such a connection was supplied by Nuodex' act of registration of its product, Super Ad-it, under the New Hampshire Economic Poisons Law. Thus, Judge Hartigan observed:

> "It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a 'mixture of substances,' such as King's paint. See N. H. Rev. Stat. Ann. c. 438, §1 (1955). Therefore, the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product, and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen." (Appendix A *infra* at xx)

And to the same effect, Chief Judge Magruder states:

> "This sale (of King's greenhouse paint, containing Super Ad-it, to the plaintiff) was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act." (Appendix A *infra* at xx; parenthesis supplied.)

We respectfully submit with due deference for the Court of Appeals, that upon analysis both of the foregoing quotations will be found to set forth clear and manifest error.

[6] 326 US 310, 90 L. Ed. 95 (1945)

In the first place, we suggest that in terms of logic and policy, it is error to find a link of jurisdictional significance between plaintiff's harm and the Petitioner by reason of Petitioner's local registration of its product, Super Ad-it. Had Petitioner failed to register, this link would have been missing and jurisdiction would have failed. But if jurisdiction might have been avoided by Petitioner's failure to register its product in accordance with the statute, should it be penalized for precautions it took to comply with the law? This was simply a product registration with the New Hampshire Commissioner of Agriculture to permit lawful interstate shipments into the state. It was in no sense a registration by a foreign corporation for purposes of doing local business in New Hampshire. Under the reasoning of the majority of the Court of Appeals, Petitioner would have been better off to have ignored the New Hampshire Economic Poisons Law. In truth, the legality of the entry of King's paint into New Hampshire has no logical connection with plaintiff's injury, for the same injury might have occurred if the entry had taken place unlawfully (assuming as the reviewing judges did, that its entry was in fact lawful).

Even accepting, however, the illogical premise that registration by Nuodex to permit King's paint to be sold legally in New Hampshire would establish a local connection between Petitioner and plaintiff's harm, the Court of Appeals has committed clear error in concluding that any registration which was in fact made by Petitioner in any way legalized King's local sales. On the contrary, careful reading of the New Hampshire Economic Poisons Law can lead but to a single conclusion, to wit, that Petitioner's registration of Super Ad-it had absolutely no effect whatsoever upon the legality of King's sale of its unregistered greenhouse paint in the jurisdiction (albeit King's paint contained registered Super Ad-it). Hence Nuodex' registration had no connection with plaintiff's claimed harm.

The New Hampshire Economic Poisons law sets forth in Subsection I of its first section the following definition:

> RSA 438:1 I. "The term 'economic poison' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents,

The statute is set forth *verbatim* and in its entirety in Appendix C *infra*.

> fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner shall declare to be a pest."

Section 2 makes it unlawful to sell or distribute unregistered economic poisons (438:2 I (1)) and imposes certain labeling requirements (438:2 I (2)).

Section 3 provides for registration and includes the proviso:

> "Provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison. . . ." (RSA 438:3).

Section 5 prescribes information required to be filed in connection with registration. Sections 4 and 13 provide certain exceptions and exemptions from some or all provisions of the Act, but none as to products which contain duly registered economic poisons as ingredients.

We submit that if King's greenhouse paint was an economic poison within the meaning of Section 1 of the statute, its distribution and sale in New Hampshire without registration was illegal under section 2, and the fact that Nuodex had registered Super Ad-it in no way validated it. Nuodex submitted no formula, no labels, no registration with respect to greenhouse paint. Therefore Nuodex' registration of its product had no connection with Elliott's harm from the use of a different and unregistered product of a different manufacturer. This must be the case unless King's greenhouse paint be regarded as the identical economic poison as Nuodex' Super Ad-it. But section 3 of the statute defeats such a construction for it restricts the concept of identical economic poisons to those having the same formula, manufactured by the same person, and bearing labels asserting the same claims. Nor is there any other exception or exemption anywhere in the Act, which applies to economic poisons containing duly registered economic poisons as ingredients.

Construction of the statute to require registration of King's paint, if it was an economic poison, without regard to whether or not Nuodex had registered Super Ad-it, an ingredient of the

paint formula, is not only clearly suggested by the literal text of the act, but is also necessary to accomplish its underlying purposes. If it were held that local registration by a foreign manufacturer of an ingredient relieves from any further duty of registration the manufacturer of a compound containing the ingredient, the statutory scheme to protect New Hampshire purchasers by control over the labeling, ingredients statements and claims with respect to products actually offered for sale to them would be destroyed.

It follows from the foregoing that, contrary to the holding of a majority of the Court of Appeals, Nuodex' act of registration of Super Ad-it did not render lawful the local sale of King's unregistered greenhouse paint, and hence this registration provided no connection between local activity of Nuodex in New Hampshire and plaintiff's claimed harm. On the one hand, if the paint was indeed an economic poison,[7] then its distribution and sale by King in New Hampshire without registration was just as unlawful as though Nuodex had never registered Super Ad-it. On the other hand, if it was not an economic poison, then equally clearly, there was no connection between Nuodex' registration of Super Ad-it and Elliott's harm for in this event *no* local registration was necessary to permit lawful local sales of King's paint even though it did incorporate Super Ad-it.

§2. Importance of Review

The importance of the issue presented to the Supreme Court in connection with the ground for review asserted in this section of this Argument lies in the fact that the New Hampshire statute in question is by no means unique. The great majority of the states of the Union have adopted economic poisons laws more or less similar to that of New Hampshire,[8] and many more have

[7] And presumably it was a product which inhibted mildew, a paint fungus.

[8] The following citations refer to economic poisons laws in the states indicated:

Code of Ala. (1940), (1955 Supp.), Title 2, Sec. 337 (1) *et seq.*; Ariz. Rev. Stat. Ann., Secs. 3-341 *et seq.*; Ark. Stat. 77-201 *et seq.*, as amended; Deerings Cal. Codes, Agricultural, Division 5, Ch. 7, Secs. 1061 *et seq.*, as amended; Col. Rev. Stat., Ch. 6, Art. 12; Gen. Stat. of Conn. (1949), Title 30, Ch. 30, Secs. 3999 *et seq.**; Fla. Stat., Ch. 487; Ga. Code (1933), Part V, Chs. 5-15; Rev. Laws of Hawaii (1945), Ch. 18A, Secs. 1180-1 *et seq.*, as amended; Smith-Hurd Ann. St. (Ill.), Ch. 38, Sec. 187*; Code

other legislation which is similar in its use of the statutory scheme of prohibiting local distribution or sale of particular types of products in the jurisdiction without their prior registration with some designated state agency.[10] It must be expected that from time to time claims will be brought in these jurisdictions for harm allegedly incurred by plaintiffs as a result of the use of compounds which should have been registered and that in some of these cases there will be issues of personal jurisdiction over foreign corporate manufacturers of such compounds and their ingredients. Under recognized due process authority at the present time, an important standard to be considered in weighing local

of Iowa (1954), Chs. 189 & 206*; Gen. Stat. of Kans., Ann., 2-2201 *et seq.*, as amended; Ky. Acts of 1956, Ch. 218, amending Ky. Rev. Stat. 247.540 *et seq.*; La. Rev. Stat. (1954 Supp.), Secs. 1601 *et seq.*; Rev. Stat. of Maine, Ch. 32, Secs. 208, 213 & 287, *et seq.*; Ann. Code of Md. Title 48, Secs. 134 *et seq.*; Mich. Public Acts of 1949, No. 297; Minn. Stat., 24.072 *et seq.*; Miss. Code Ann. (1954 Supp.), Secs. 5000.01 *et seq.*; Vernon's Ann. Mo. Stat. (1956 Supp.), Secs. 263.70 *et seq.*; Rev. Codes of Mont., 27-201 *et seq.*; Nev. Rev. Stat., Chs. 586.010 *et seq.*; N. H. RSA Ch. 438; N. J. Stat. Ann. (1956 Supp.), Title 4, Ch. 8A; New Mex. Stat. Ann., Secs. 45-9-1 *et seq.*; N. Y. Agriculture & Markets Law, Secs. 148 *et seq.**; Gen. Stat. of N. C., Secs. 106-51 *et seq.*, as amended; N. D. Rev. Code of 1949 (1955 Supp.), Ch. 19-18; Okla. Stat. (1955 Supp.), Title 2, Secs. 3-61 *et seq.*; Ore. Rev. Stat., Ch. 634; Purdon's Penn. Stat. Ann., Title 3, Ch. 3, Secs. 101 *et seq.*, as amended; R. I. Public Laws of 1951, Ch. 2832, as amended by Public Laws of 1952, Ch. 3008; Code of Laws of S. C. (1956 Supp.), Secs. 3-187 *et seq.*; S. D. Code of 1939 (1952 Supp.), Ch. 22.12A, as amended; Tenn. Code Ann., Secs. 43-201 *et seq.*; Vernon's Tex. Stat. (1948), Title 4, Ch. 7A, Art. 4235b, as amended; Utah Code Ann. (1953), Secs. 4-4-16 *et seq.*; Vermont Stat. (1947), Ch. 216; Code of Va. (1950), Secs. 3-198 *et seq.*; Rev. Code of Wash., Ch. 15.56; Wisc. Stat. (1955), Secs. 94.67 *et seq.*; Wyoming Comp. Stat. Ann. (1945), Sec. 46.1201 *et seq.*, as amended; Rev. Stat. of Canada (1952), Ch. 209.

*Indicates registration not required.

[10] For example, under the Sanitary Production and Distribution of Food Act of The State of New Hampshire, it is provided in part:

"RSA 143:13 Registration by Nonresident Vendors. No beverage or beverage concentrate, for retail sale, manufactured out of the state, shall be sold or offered for sale within the state unless the same has first been registered by the manufacturer thereof or by his agent with the state board of health. * * *"

Does registration under such a statute by the foreign corporate manufacturer of a concentrate provide a local connection between it and harm suffered by a New Hampshire consumer of an unregistered mixture which incorporates the concentrate as an ingredient when the mixture was manufactured outside of the state by a different manufacturer and was sold locally without registration? The Court of Appeals' decision in the present cases is authority that it does.

jurisdiction over the person of a foreign corporation is whether or not the harm complained of arose from or is connected with the defendant's local activities. *International Shoe Company* v. *Washington*, 326 U. S. 310 at 319-320, 90 L. Ed. 95 at 104 (1945). The decision of the Court of Appeals in the present cases in effect eliminates this standard from the *International Shoe doctrine* in a fact situation which there is no reason to think will be unique to this case but rather must be expected to recur. Under these circumstances, the decisions herein should not be allowed to stand as authorities in view of the manifest error upon which they are based, but certiorari should issue for their review.

II. THE DECISION OF THE COURT OF APPEALS HEREIN, IF NOT IN ACTUAL CONFLICT WITH SUPREME COURT AUTHORITY, IS SUCH A MAJOR EXTENSION OF THE LAW OF JURISDICTION OVER FOREIGN CORPORATIONS AS HERETOFORE DECLARED BY THE SUPREME COURT THAT A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THIS JUDGMENT.

§1. Leading Supreme Court Authority as to "due process" limits of jurisdiction over foreign corporations.

The modern "due process" limits of jurisdiction of the courts of a state over foreign corporations were declared by the Supreme Court of the United States in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945) and have been clarified and explained in such subsequent cases as *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643, 94 L. Ed. 1154 (1950) and *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 96 L. Ed. 485 (1952). In the *International Shoe* case, the ultimate "due process" test of whether a foreign corporation was doing business locally in such manner as to be subject to the jurisdiction of the state court was declared to be whether the local maintenance of the action was consistent with "traditional notions of fair play and substantial justice." (90 L. Ed. 95 at 102). The Court undertook to suggest certain standards to be taken into account in weighing fairness. It said:

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact. Klein v. Tax Supers, 282 U. S. 19, 24, 75 L. ed 140, 143, 51 S Ct 15, 13 ALR 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. * * *

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. * * *

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue. * * *

"Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. * * * " (90 L. Ed. at 102, 103, 104).

What is the teaching of this language of the Court? What is the meaning of such phrases, as "systematic and continuous activities," a "large volume of business," and the enjoyment of the "benefits and protection" of local law? In the context of the

case before the Court this language referred to a foreign corporation which the evidence showed had regularly maintained a full-time resident sales force of eleven to thirteen of its own employees in the jurisdiction. Here, living and working in Washington, their "regular and continuous" activities had earned for them commissions of more than $31,000 per year and the volume of sales by the defendant must have run into hundreds of thousands of dollars. Here defendent had from time to time rented show rooms for demonstrations of its products in the state. In so conducting its local operations through its agents, defendant had indeed enjoyed substantial benefits and protection of local laws. And the claim asserted against the foreign corporation was by the State and in the exercise of its taxing power as to obligations arising from the very activities of defendant's own employees in defendant's behalf in the jurisdiction. (90 L. Ed. 95 at 100-101.)

Contrast all of the above with the facts in the present cases. Here, only a salesman representing Nuodex as well as seven other manufacturers whose business was much more important to him (*supra* at 7) could be said to have been in the jurisdiction at all repetitively for Nuodex, and the evidence of his call reports is clear that he came but occasionally and often did nothing for Nuodex. (*Supra* at 7-9). His selling time in New Hampshire for Nuodex was at most a day or two a year (*supra* at 8-9). Here, in contrast to the "large volume of business" of the *International Shoe* case, Nuodex' annual sales into New Hampshire averaged less than $2,000 and Litter's annual commissions have been less than $100 (*supra* at 8). Nuodex has had no property in New Hampshire to enjoy the benefits and protection of local law, nor did its personnel or it in its corporate activities enjoy any such benefits (*supra* at 5-6). Its registration under the New Hampshire Economic Poison Act (RSA 438, Appendix C *infra* at 70) of certain of its products, some of which apparently were never shipped into the State, to avoid risk of criminal liability for itself and its customers in the event of casual sales there is certainly not the kind of enjoyment of the general benefits and protection of local law which bears upon the question of the fairness of sustaining local jurisdiction over a foreign corporation. Finally, the complaint herein is a private complaint which the District Court correctly found has no connection whatsoever

with any activity by or for Petitioner in the jurisdiction" in contrast with the *International Shoe* complaint which was founded upon an application of the taxing power of the State of Washington to defendant's very local activities.

Can it be said that "traditional notions of fair play" contemplate compelling a nonresident corporation such as petitioner to defend this sort of action in a foreign jurisdiction with which its contacts have been as insubstantial and occasional as those of Nuodex with New Hampshire? We respectfully believe that it cannot and that the standards of the *International Shoe* case so dictate. When *International Shoe* was decided, it was viewed as laying down a liberal rule of jurisdiction. But that case as contrasted with this is as black against white.

Perkins v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 96 L. Ed. 485 (1952) is also instructive of the Supreme Court's conception of such continuous, systematic and substantial activities of a foreign corporation in a jurisdiction as will suffice under modern law of due process, to support service of process upon it there. The issue before the Supreme Court was whether it was indispensable to local jurisdiction over a foreign corporation under the due process clause of the Fourteenth Amendment that the subject of the claim be related to defendant's local activities. Holding that this was not an indispensable jurisdictional condition in every case, the Supreme Court said:

> "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in International Shoe Co. v. Washington, supra . . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." (96 L. Ed. 485 at 492.)

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[11] Although the Court of Appeals erroneously found such a connection. See Part I of this Argument *supra*.

The Court then turned to the narrow question as to whether Benguet could be held to defend in Ohio as to a cause of action unrelated to its local activities.

> "It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was *sufficiently substantial* and of such nature as to *permit* Ohio to entertain a cause of action against a foreign corporation where the cause of action arose from activities entirely distinct from its activities in Ohio." (First emphasis supplied. 94 L. Ed. 485 at 493.)

The Court sought the answer in the evidentiary facts of the case which it recounted in detail as follows:

> "* * * The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Phillippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both

during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that state at the time he was served with summons. * * * (U)nder the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding." (96 L. Ed. 485 at 493-494.)

The *Perkins* case, like *International Shoe*, can be of small comfort to respondents herein. Again, in it the meaning which the Supreme Court has heretofore attached to continuous, systematic and substantial activities in the jurisdiction is revealed by the quoted recitation of underlying evidentiary facts. Again, by contrast with it, the insubstantial, occasional and tenuous nature of Nuodex' contacts with New Hampshire for purpose of jurisdiction is manifest.

See also *Travelers Health Assn. v. Virginia*, 339 U. S. 642, 94 L. Ed. 1154 (1950) where the issue was as to the jurisdiction of the State of Virginia over a foreign mail order insurance company in an action brought to effectuate the public policy of the state as to registration and regulation of such enterprises. In sustaining jurisdiction the Supreme Court noted the volume and extent of defendant's local business promoted in Virginia by Virginians, the continuing nature of the relations which its insurance contracts created, the regular commission of local acts in its behalf as by the investigation of losses, and the relation of the subject of the proceeding to defendant's local contacts and activities (94 L. Ed. at 1160, 1161). Again in this authority the clear implication of the reasoning of the Supreme Court in its discussion of relevant jurisdictional facts is that local jurisdiction over a foreign corporation depends upon far greater contacts with the state than Nuodex has had with New Hampshire.

§2. The Court of Appeals opinions herein differ among themselves, and two of the three are novel applications of the International Shoe doctrine.

Each of the judges who considered these cases in the Court of

Appeals concluded that the fundamental issue which they pose is as to the scope of the power of a New Hampshire court over the person of Nuodex under the due process clause with respect to these claims. Each agreed with the others that this issue was governed by the doctrine of the *International Shoe* case, and each concurred in the result that New Hampshire did have jurisdiction. No one of the reviewing judges, however, agreed with any one of the others as to the reasoning by which he arrived at his result. Judge Hartigan apparently felt that the evidence met all of the standards of *International Shoe*, including the necessary quality and nature of defendant's local activities (Appendix A *infra* at 51-52 9-11) as well as a connection between the injury complained of such local activities. Chief Judge Magruder was more cautious in his statement of the proper doctrines of law applicable to the evidence. He said:

> "[T]he manifested activities within the state by a foreign corporation may amount to a 'doing business' of so continuous and systematic a nature as reasonably to permit the state to subject the foreign corporation to service of process with respect to any cause of action, wheresoever arising. On the other hand, a much lesser manifestation of activity within the state may, consistently with due process, justify a state to exercise personal jurisdiction over the foreign corporation, sued on a cause of action having some connection with or arising out of those activities within the state." (Appendix A *infra* at 53.)

He then expressed doubt that the underlying facts of the case at bar would suffice to make out that Nuodex was doing business of "so continuous and systematic a character" as to be subject to the personal jurisdiction of the state as to any and all causes of action. But the present cause of action he thought to be related to Nuodex' local activity since:

> "This sale (by King to Plaintiff) was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act." (Appendix A *infra* at 54.)

Conter Part 1 of this Argument *supra* for reasons why we believe this latter conclusion was error.

See note 11 *supra*.

And he agreed in the result that jurisdiction should be sustained Judge Woodbury adopted still a different view. Apparently regarding the standards of fairness set forth in the *International Shoe* case as inapplicable to the particular case at bar, he proposed a new "conflict of interest" test:

> "I suggest that application of the test of 'fair play and substantial justice' calls for reference to the specific interests in conflict in each particular case. Thus in this case I think we should weigh on the one hand the legitimate interests of the state, 1) in providing local access to compensation for wrongs done to its citizens, and, 2) in regulating potentially harmful activity within the state, as against, on the other hand, the legitimate interests of the foreign corporation relative, 1) to its reasonable expectations as to the laws and liabilities to which it was subjecting itself, and, 2) to its opportunity to defend itself without undue expense and inconvenience." (Appendix A at 56.)

Clearly, the above is a substantial departure from the standards of fairness heretofore laid down by the Supreme Court for the guidance of inferior tribunals in their administration of the *International Shoe* doctrine.

§3. Importance of review

Petitioner respectfully submits that the judgment of the Court of Appeals hereinbelow manifestly sanctions an assertion of state court jurisdiction substantially beyond the bounds heretofore suggested by applicable Supreme Court authorities. In doing so, each of the members of the Court of Appeals has applied the doctrine of the *International Shoe* case to the facts in a different manner, and Judge Woodbury, indeed, has utilized an entirely new set of standards by which to implement its rule of fairness.

Petitioner respectfully submits that certiorari should issue for review of the *holding* of the Court of Appeals herein because this holding is at odds with the indications of existing Supreme Court authority in that by the standards of such authority petitioner's local contacts with New Hampshire were not of a jurisdictional "quality and nature" and were not systematic, continuous and

substantial; and further because the issue involved is a litigious one likely to recur in future litigation.

Petitioner further respectfully suggests that there is an unusual but important technical reason for the Supreme Court to exercise its supervisory power over the lower courts by directing that certiorari issue herein for review of the judgments of the Court of Appeals below. This is the diversity of reasoning employed by the several reviewing judges of the Court of Appeals in arriving at their conclusion that jurisdiction of the District Court over the person of the petitioner should be sustained. The result of this diversity of reasoning is that in the present posture of these cases the law of the First Circuit as to the "doing business" issue has become uncertain. In his "conflict of interest" test of the fairness of sustaining jurisdiction over a foreign corporation, Judge Woodbury suggests as one of the criteria of fairness the corporation's ". . . reasonable expectations as to the laws and liabilities to which it was subjecting itself . . ." (Appendix A, *infra* at page 56.) Certainly under our Anglo-American legal system reasonable predictability of the law is accepted as of vital importance. But by what standards is a nonresident corporation to form its expectations as the laws and liabilities to which it may be subject in the First Circuit? Is it to understand, in accordance with Judge Hartigan's opinion, that contacts such as Petitioner had with New Hampshire are of such quality and nature and are so systematic, continuous and substantial as to support jurisdiction generally as to any and all causes of action? Or should it understand that such contacts are generally insufficient unless an action happens to arise from a particular local contact, as Judge Magruder suggests? Or, finally, should it understand that in the First Circuit the standards of jurisdiction suggested in the *International Shoe* opinion are no longer determinative, but that jurisdiction is to be determined in each case according to the way in which a reviewing court happens to weigh the particular conflicting interests which the case presents. With deference to the Court of Appeals for the First Circuit, petitioner respectfully suggests that the Supreme Court may properly and wisely direct that certiorari issue herein in order that these

[1] See Part IV, Section 2 of this Argument *infra* for a partial listing of cases simply since 1950 involving questions of jurisdiction over foreign corporations in fact situations analagous to those of the present cases.

quesions shall not remain unanswered but that the law in point may be clarified and reasonable predictability restored to it.

III. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF NEW HAMPSHIRE LAW CONTRARY TO THE APPLICABLE AUTHORITIES OF THE LAW OF THE STATE IN HOLDING THAT THE NEW HAMSHIRE LAW OF JURISDICTION OVER FOREIGN CORPORATIONS KNOWS NO LIMITS OTHER THAN THOSE OF FEDERAL DUE PROCESS.

§1. These cases present an issue of state law.

In a diversity case in which there is raised the issue of the jurisdiction of the District Court over the person of a foreign corporation on the ground that it is not "doing business" locally, the resulting jurisdictional inquiry must be upon two levels: first, the level of state law, and second that of federal constitutional law. The state law issue arises in the following manner. According to the federal venue statute:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.* * *
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (28 U.S.C.A. §1391.)

The present proceeding being a diversity action brought in New Hampshire against Nuodex, a New York corporation not licensed to do business in New Hampshire, the foregoing statute will suffice as authority to try the action in the District Court for New Hampshire only if Nuodex was in fact "doing business" locally. Under the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), the question of whether a foreign corporation is "doing business" within a state is to be tested by the law of the jurisdiction. See *Lone Star Package Car Co.* v.

Baltimore & O. R. Co., (C.A. 5th Cir., 1954), 212 F. 2d 147 at 153n; and *Kenny v. Alaska Airlines*, (S. D. Calif., 1955) 132 F. Supp. 838 at 843-849 where this issue is fully discussed and many authorities cited.

The several opinions filed herein by the reviewing judges of the Court of Appeals agree in recognizing that the sufficiency of the jurisdiction of the District Court over the person of the Petitioner must be tested by the standards of New Hampshire law as well as by those of the law of due process. In the main opinion of Judge Hartigan, however, this issue is disposed of by his conclusion that even if New Hampshire law imposes any more rigorous standards of jurisdiction than those of the federal law of due process, the evidence showed that any such standards were met in the present cases. (Appendix A *infra* at 50-51.) The two concurring opinions are more cautious as to the evidence but more liberal in their construction of the scope of the New Hampshire law of jurisdiction: each construes this law to place no narrower restrictions upon the jurisdiction of the State courts than those of federal due process, however expansive the bounds of due process may be. Neither therefore makes further inquiry as to the sufficiency of the jurisdictional facts herein under any standards of state law more limited than those conceived by the reviewing judge to be appropriate to the law of due process.

We submit that this was error. For we believe that there is a body of New Hampshire law on the issue of local jurisdiction over foreign corporations which the Court of Appeals should have considered. If it had, it would have found that this law imposes a test of systematic, continuous and substantial local contacts as well as one of a relation of the claim to some such local contact of the foreign corporation. Correct application of this New Hampshire law of jurisdiction to the facts of these cases

The issue of the sufficiency of the foreign corporation's local activities to constitute doing business under local law also arises under Rule 4 (d) (3) and 4 (d) (7) of the *Federal Rules of Civil Procedure* wherein provision is made for service of the summons and complaint "being there in fact provided that in an action against a foreign corporation

> it is also sufficient, if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." (Rule 4 (d) (7).)

would have resulted in a contrary judgment in the Court of Appeals to that actually entered.

In the recent case of *LaBonte* v. *Company*, 98 N. H. 163 (1953), the Supreme Court of New Hampshire remarked with reference to the issue of state court jurisdiction over a foreign corporation:

> "While many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." (98 N. H. 163 at 166.)

There is, therefore, an independent test of state law to be considered. The test of jurisdiction under this state law, however, is closely related to federal law of due process, for the New Hampshire Court speaks of it as the test of the *International Shoe* case. *Grace* v. *Company*, 95 N. H. 74 at 77, (1948); *Taylor* v. *Klenzade Products, Inc.*, 97 N. H. 517 at 519 (1952); *LaBonte* v. *Company*, 98 N. H. 163 at 167-168 (1953). More precisely, however, it is the doctrine of the *International Shoe* case as that doctrine has been construed, applied and approved by the Supreme Court of New Hampshire.

We are aware of nothing in any opinion of the New Hampshire Supreme Court which declares, or in any way suggests, the open-ended rule of jurisdiction announced by the majority of the Court of Appeals, to wit, that New Hampshire statutory jurisdiction, properly construed, extends to the ultimate bounds of due process, no matter how expansively those bounds may be set and without regard to whether they are fixed in accord with the law of the *International Shoe* case or otherwise.[10]

Judge Woodbury cites *Campbell* v. *United States Radiator Corp.*, 86 N. H. 310 (1933) and *Grace* v. *Proctor & Gamble Co.*, 95 N. H. 74 (1948) as indicating ". . . unmistakably that in New Hampshire foreign corporations are subject to local jurisdiction up to the limits imposed upon state action by the due process clause of the Fourteenth Amendment." (Appendix A *infra* at

[10] Note that such a rule entirely disregards, without consideration, the possibility that the Constitution of the State of New Hampshire might be construed to fix more restrictive bounds of jurisdiction over foreign corporations than the most liberal possible ultimate construction which may be given the due process clause of the Fourteenth Amendment by the Supreme Court of the United States.

55.) But it is difficult to see how the authorities cited support the inference. The *Campbell* case involved a holding that under the prevailing law of due process, jurisdiction of the nonresident corporate defendant was wanting; and *Grace* involved simply an instruction to the trial court that the correct test of jurisdiction is that stated in *International Shoe*. Neither case included any discussion of the scope and meaning of the New Hampshire jurisdiction statute. The two more recent New Hampshire cases on the point at issue have simply reaffirmed that the test of jurisdiction is to be found in the principles of the *International Shoe* case. (*Taylor* v. *Company*, 97 N. H. 517 at 519 (1952); *LaBonte* v. *Company*, 98 N. H. 163 at 167 (1953). Again, neither has suggested that jurisdiction under New Hampshire law is open-ended and extends in any degree beyond the bounds heretofore approved by the Court.

§2. NEW HAMPSHIRE LAW IMPOSES A JURISDICTION REQUIREMENT OF SYSTEMATIC, CONTINUOUS AND SUBSTANTIAL LOCAL ACTIVITIES BY THE NONRESIDENT AS WELL AS A RELATION OF THE CLAIM TO SUCH LOCAL ACTIVITY.

If the proper standards of the New Hampshire law of jurisdiction over foreign corporations are indeed those of *International Shoe, supra*, as understood and construed by the New Hampshire Court, the decision of the Court of Appeals herein is contrary to such declared law. A key criterion of jurisdiction under the rule of the *International Shoe* case, recognized in New Hampshire (*Taylor* v. *Company*, 97 N. H. 517 at 519, 520-521; *LaBonte* v. *Company*, 98 N. H. 163 at 167) as well as elsewhere, is whether the defendant corporation is "systematically and continuously" engaged in persuit of its business interests in the jurisdiction.

The Supreme Court of the United States gave a suggestion as to the meaning of this phrase in *Perkins* v. *Benguet Etc. Co.*, 342 U.S. 437, 96 L. Ed. 485 (1952) when it said:

> "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a

> license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." (342 U. S. 437 at 445, 96 L. Ed. 485 at 492.)

In *LaBonte* v. *Company*, 98 N. H. 163 (1952) the Supreme Court of New Hampshire indicated its practical understanding of this language:

> "While the concept of doing business is a legal one, it should bear some relation to the concept of doing business in a commercial sense." (*LaBonte* v. *Company*, 98 N. H. 163 at 167.)

The jurisdictional criteria of systematic and continuous local activities having a relation to the subject of the claim have been expressed in each of the two recent New Hampshire cases on the "doing business" issue. *In Taylor* v. *Company*, 97 N. H. 517 (1952), the Court said:

> "One of the criteria (of jurisdiction under the *International Shoe* case) is whether the defendant's activities were 'systematic and continuous.' * * *
>
> "A second requirement suggested by *International Shoe Co.* v. *Washington*, *supra*, is that the suit should 'arise out of or [be] connected with the [defendant's] activities within the state.' *Id.* 319." (97 N. H. 517 at 519, 521.)

The evidence in *Taylor* showed that the defendant had induced the plaintiff to move from Vermont into New Hampshire to serve there as its employee and better handle its local business, and that plaintiff spent more than half of his working time in New Hampshire promoting sales of defendant's products and servicing them and equipment with which they were used in the hands of local customers. The claim was for defendant's breach of this employment contract. The Court concluded:

> "In our judgment this activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state. The plaintiff's activity was systematic and continuous. Similar activity had been carried on for four years before the plaintiff was employed.

and so far as appears continued after termination of his employment.

* * *

"While the pending action does not arise directly out of sale of the defendant's products, and seeks enforcement of no obligation arising from a sale, yet it is accounted for only by the defendant's activities in New Hampshire. Clearly it is 'connected with' the business done here, and arises from it in the sense that if the defendant had not hired the plaintiff to carry on its activities here the occasion for the suit would never have arisen." (97 N. H. 517 at 520-521.)

In *LaBonte* v. *Company*, 98 N. H. 163 (1952) the New Hampshire Court further explained the local law of jurisdiction over foreign corporations. This was a libel action against Mercury, a foreign publisher of a magazine printed in New Hampshire. The masthead of the periodical bore a New Hampshire publication office address, magazines were stored in New Hampshire pending shipment, and defendant's employees were regularly present in the jurisdiction in connection with publication. The Court observed:

"The assembling, printing and binding of the magazine by Rumford for Mercury is a systematic and continuous activity which is done under orders, instructions and inspections by Mercury. The mailing, shipping, addressing, and storage of the magazine by Rumford has been authorized by Mercury. Rumford, as agent for Mercury receives and forwards mail received here. * * *

"While the concept of doing business is a legal one, it should bear some relation to the concept of doing business in a commercial sense. Certainly the printing and distribution of a magazine is an essential part of the publication of magazines in both a legal and commercial sense. If the plaintiff has a cause of action for libel, the state where the libelous magazine is systematically printed and distributed may assume jurisdiction without offending '. . . our traditional conception of fair play and substantial justice.' *International Shoe Co.* v. *Washington*, *supra*, 320. Any libel that may have been committed by Mercury is sufficiently connected

with its printing and distribution in this state 'to satisfy the primary requirements of the' cited case. *Taylor* v. *Company*, 97 N. H. 517, 521." (98 N. H. 163 at 167-168.)

The *Taylor* and *LaBonte* cases each involved a fact situation in which the foreign corporate defendant had been engaged in continuous, regular and substantial activities in the jurisdiction bearing an obvious "relation to the concept of doing business in a commercial sense" and in each the claim was connected with the local activity. Neither involved such insubstantial and occasional contacts with the jurisdiction as those of Nuodex herein; nor has any other case yet presented to the New Hampshire Court a fact situation similar to that of the present litigation. Under these circumstances, it is to be presumed that the New Hampshire Court would determine the issue of the sufficiency of Petitioner's local contacts to sustain jurisdiction in the present action by due consideration of the broad principles announced in *Taylor* and *LaBonte*, with an awareness that the issue herein ". . . is limited to jurisdiction for service of process and is not concerned with jurisdiction for taxation, license or other purposes" (*LaBonte* v. *Company*, 98 N. H. 163 at 166 [1953]), and with due regard for the decisions of respected courts of sister states as to the want of state jurisdiction under comparable circumstances. Indeed, we respectfully suggest that it would be highly pursuasive to the New Hampshire Court that fact situations closely analagous to that at issue herein have been presented to other tribunals, under similar jurisdiction statutes, and that the decision has been uniformly adverse to the existence of jurisdiction. (*Robbins* v. *Benjamin Air Rifle Co.*, (C.A. 5th Cir., 1954), 209 F. 2d 173; and see many other cases cited in this Argument, Part IV, §2 *infra*.)

§3. The present cases do not meet the New Hampshire criteria for local jurisdiction over a foreign corporation of continuous, systematic and substantial local activities and of a relation of the claim to such a local contact.

We have already set forth above the diversity of the reasoning of the several opinions herein by the reviewing judges of the

Court of Appeals. (*Supra*, Part II, §2). It will be recalled that only the opinion of Circuit Judge Hartigan was unqualified in affirming the finding that Nuodex' local activities in New Hampshire were systematic and continuous. Chief Judge Magruder, in effect, disagreed with Judge Hartigan, for he said:

> "I doubt whether the underlying facts in the case at bar would warrant the ultimate conclusion that Nuodex was 'doing business' within the State of New Hampshire of so continuous and systematic a character as to subject itself to the exercise of personal jurisdiction by the state on account of any and all causes of action, wheresoever arising." (Appendix A, *infra*)

The Chief Judge believed, however, that there was a connection between Nuodex' minimal activities in the jurisdiction and the subject of the claim, and he therefore concurred in the result that the District Court had jurisdiction of the Petitioner. Circuit Judge Woodbury also concurred in the result, arriving at his conclusion by implementing the *International Shoe* doctrine by a "conflict of interest" test (*supra* at 24).

The mere recitation of the reasoning of the Chief Judge and of Circuit Judge Woodbury makes it clear that these two, constituting a majority of the Court of Appeals, arrived at their conclusions sustaining jurisdiction over the Petitioner by the use of jurisdiction standards unknown to the law of New Hampshire. Neither justified his reversal of the trial court by holding that the evidence met the New Hampshire criteria of systematic, continuous and substantial local activities by the foreign corporation together with a claim connected with such local activity. Neither considered that the Supreme Court of New Hampshire, confronted with the issue of this case as a novel issue to it, would be guided in its decision as to the sufficiency of local jurisdiction by the decisions of other respected forums.

For these reasons and with deference to the Court of Appeals, we believe that the holding of that Court herein sustaining the jurisdiction of the District Court over the person of Petitioner cannot be accepted as a correct expression of the relevant law of the State of New Hampshire. We further respectfully submit that the issue of the existence of an independent body of state

law in point is of such importance as to merit the review of the United States Supreme Court.

IV. THE DECISION OF THE COURT OF APPEALS HEREIN IS UPON A QUESTION OF GREAT IMPORTANCE, AND FOR THIS REASON A WRIT OF CERTIORARI SHOULD ISSUE FOR ITS REVIEW.

§1. Personal jurisdiction is an inherently important issue in the federal system.

The importance of the issues involved in the decision below stems from the very nature of our federal system. So long as personal jurisdiction of the defendant in an ordinary civil action is a condition precedent to the exercise of judicial power, there will be controversy in this system as to the power of the local forum over the nonresident defendant. The Supreme Court, as the ultimate arbiter at the head of the federal system, has an especial responsibility to declare and supervise the administration of the law of interstate jurisdiction in order to facilitate the just and efficient working of the system as a whole.

§2. The "doing business" question on facts similar to those of this case has been provocative of litigation, and clarification of the applicable law is therefore important.

Some suggestion of the importance of the issues herein is given by the mass of litigation which is continually going on in the courts involving issues of personal jurisdiction over nonresident corporations. In the period since January 1, 1950 the following cases have been decided on fact situations more or less analagous to those of the present actions, though in every case stronger from a jurisdictional standpoint, and in each of these cases jurisdiction was denied: *Robbins* v. *Benjamin Air Rifle Co.*, (C. A. 5th Cir., 1954) 209 F. 2d 173, a case closely in point on its facts with the present cases; *Pattin* v. *Michaels Art Bronze Co., Inc.*, (C. A. 3d Cir., 1953) 202 F. 2d 541, also very closely in point on its facts to the present cases; *Levine* v. *Wallitzer* (Sup. Crt., Kings C., 1953) 130 N.Y.S. 2d 346; *Vassallo* v. *Slomin*, 278 App. Div. 949, 105 N.Y.S. 2d 60 (1951); *Roberts*

v. *Evans Case Co.* (C. A. 7th Cir., 1955), 218 F. 2d 893; *Johns v. Bay State Etc. Co.* (D. C. Md., 1950), 89 F. Supp. 654; *Read v. Corbitt Co.* (E. D. Pa., 1950), 10 F. R. D. 125; *Anderson v. Page & Hill Homes Inc.* (S. E. D. N. D., 1950), 88 F. Supp. 408; *Radio Station W.M.F.R. v. Fitel-McCullough, Inc.*, 232 N. C. 287, 59 S. E. 2d 779 (1950); and *Albritton v. General Factors Corp.* (C. A. 5th Cir., 1953), 201 F. 2d 138.

In addition to the foregoing recent cases in which jurisdiction over nonresident corporations was denied, in the following cases jurisdiction was sustained where the facts were again somewhat similar to those of the case at bar but the contacts with the jurisdiction were clearly more substantial than those involved herein: *Shilling v. Roux Distributing Co.*, 240 Minn. 71, 54 N.W. 2d 907 (1953); *Koninklijke v. Superior Court*, 107 Cal. App. 2d 495, 237 P. 2d 297 (1951); and *Boyd v. Warren Paint Co.*, 254 Ala. 687, 49 S. 2d 559 (1950).

It is true that many of the foregoing cases were decided primarily upon the reviewing court's construction of local jurisdiction statutes. But all have been decided since the *International Shoe* decision and there was frequent reference in them to that authority with the suggestion that by its standards the same decision would be reached. If the decision in the present case below is correct, the courts which have considered the numerous cases cited above are typically wrong in their conception of the scope of permissible state jurisdiction over foreign corporations under the *International Shoe* rule. Since the due process issue of the *International Shoe* case is always in the background in any action in a state court or in any diversity proceeding in a federal court when the question of jurisdiction over a foreign corporation is raised, we believe that the litigious nature of the jurisdiction question calls for Supreme Court review of the issues herein.

3. Even after declaring the jurisdiction standards of the International Shoe decision, the Supreme Court has recognized that the question of local jurisdiction over a foreign corporation may give rise to difficult and important issues meriting its review.

In the *International Shoe* case the Supreme Court declared that the due process limits of state court jurisdiction over foreign

corporations were to be determined in accordance with traditional notions of fair play and substantial justice, and in its opinion in this case and in the appeal of the *Travelers Health* case (*supra* at 22 *et seq.*) the Court explained and developed certain standards by which it suggested that due process fairness should be appraised. Thereafter, in *Perkins* v. *Benguet Consolidated Mining Co.*, (*supra* at 20 *et seq.*) the Court was presented with a petition for certiorari to review a judgment of the Supreme Court of Ohio (*Perkins* v. *Benguet Etc. Co.*, 155 Oh. St. 116 at 119-120, 98 N. E. 2d 33 [1951]), in which it appeared that that Court might have construed the *International Shoe* rule to preclude jurisdiction as to a foreign corporation where the claim bore no relation to any local contact or activity by the corporation. The Court directed that certiorari issue to review the decision below, found that it was governed by the general test of fairness discussed in *International Shoe*, 342 U. S. 437 at 445, 96 L. Ed. 485 at 492), and concluded that on the evidence of the record ". . . the business done in Ohio by the respondent mining Company was sufficiently substantial and of such nature as to *permit* Ohio to entertain . . ." the cause of action against the nonresident defendant. (342 U. S. 437 at 447, 448, 96 L. Ed. 485 at 493, 494)

The Supreme Court might readily have viewed the issue presented on the petition for certiorari in the *Perkins* case as involving merely error by the Supreme Court of Ohio. Indeed, in the *International Shoe* opinion the Court had already expressly observed:

> ". . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See Missouri K. & T. R. Co. v. Reynolds, 255 U.S. 565; 65 L. ed 788, 41 S. Ct. 446; Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915; cf. St. Louis S. W. R. Co. v. Alexander, 227 U.S. 218, 57 L ed 486, 33 S Ct. 245, Ann Cas 1915B77, supra." (90 L. Ed. at 103)

But the Court rightly concluded that the issue put by the *Perkins* petition was important, and certiorari was duly ordered.

§4. THE PRESENT CASES PRESENT IMPORTANT CONSTITUTIONAL QUESTIONS.

(a) *"Does the "quality and nature" of a foreign corporation's local contacts affect their jurisdictional significance?"* As did *Perkins* the present cases present an important constitutional issue as to the scope of a court's jurisdiction over a foreign corporation under the federal system. This issue has two aspects. The first is as to the meaning of the language of the Supreme Court in the *International Shoe* decision where it was said that the due process issue as to jurisdiction depends upon the "*quality and nature*" of the defendant's local activities in relation to the fair and orderly administration of the laws. (Emphasis supplied. 326 U.S. 310 at 319, 90 L. Ed. 95 at 104.) We believe that in the present cases the Court of Appeals arrived at its judgment without due consideration of this language but rather by the application to the facts of a mechanical conception of jurisdiction which regards any contact of a foreign corporation with the jurisdiction as substantially the same as any other.

The importance of the point lies in the fact that the modern business world has seen the development of a wide variety of arrangements by which manufacturers provide for the sale and distribution of their products. For example, among other possible arrangements, a manufacturing corporation may have its own field selling organization, either within the manufacturing enterprise itself or as an affiliated corporation; it may sell through regional distributorships of some sort; or it may have one or more independent and unaffiliated sales representatives which handle its goods in different parts of the country. The latter type of representative, operating as an independent contractor, may handle the goods of a single manufacturer exclusively, or it may handle the products of several or of many manufacturers. It may have offices and personnel in every state, or it may have one or more regional offices with personnel assigned to cover territories comprising all or parts of several states. The manufacturer may ship only on order from stocks maintained at its plants, or it may maintain regional warehouses in the vicinity of its major markets. It may maintain a field technical staff to provide services to customers for its products where they are used, or it may concentrate its service activities rather in offices and laboratories at its headquarters.

Does each of the foregoing types of relationship of the basic manufacturing corporation to the various jurisdictions over the country to which its products may ultimately find their way have the same jurisdictional significance? The opinions in the Court below, with the possible exception of that of Chief Judge Magruder, suggest no ground for differentiation. Yet we submit that these different types of relationship of the foreign manufacturing enterprise to the local jurisdiction involve great variation in the "quality and nature" of its local contacts, and that the rule of the *International Shoe* case, properly applied, recognizes that the fairness of holding it to defend in the local forum depends upon the particular quality and nature of the local contacts in the particular case. We respectfully submit that disregard of this principle gave rise to error in these cases.

(b) *Do Nuodex' contacts with New Hampshire meet the International Shoe standards of systematic, continuous and substantial activities in the jurisdiction?* The second aspect of the constitutional question herein before the Court is as to the meaning to be given to certain of the standards of fairness suggested by the Supreme Court in explaining the rule of the *International Shoe* case. For example, if the standard, "systematic and continuous" activities in the jurisdiction, is construed in terms of the factual contexts of the several Supreme Court cases which have heretofore employed this phrase (cf. *supra* at 17 *et seq.*), the contacts of Nuodex with New Hampshire were surely casual, occasional and irregular. Similarly, if the standard of a "substantial" volume of local business suggested in *International Shoe* (326 U. S. 310 at 320, 90 L. Ed. 95 at 104) and *Perkins* (342 U. S. 437 at 447, 96 L. Ed. 485 at 493) is construed in terms of the factual context of those two cases, Nuodex' business with New Hampshire accounts was certainly *de minimis*.[17]

Of course, just as the *Perkins* petition for certiorari might have been dismissed on the ground that it asserted simply error in the Court below, so also here it may be said that petitioner asserts no more than error in the application by the Court of Appeals of standards of law already announced by the Supreme Court in *International Shoe* and subsequent cases. We answer

[17] See Part I of this Argument *supra* for consideration of the standard of a connection between local activity by the foreign corporation and the subject matter of the claim as applied to this case.

respectfully that the errors herein asserted are with regard to constitutional questions which call for and merit the consideration of the Supreme Court.

§5. THESE CASES PRESENT AN IMPORTANT QUESTION AS TO THE APPLICATION OF A COMMON FORM OF STATE STATUTE.

We have already explained in Part I of this Argument *supra* the reasons why we believe that the Court of Appeals clearly erred in reversing the District Court finding that the harm herein complained of bears no relation to any local activity by Petitioner and in ruling that such a connection may be predicated upon Petitioner's registration of Super Ad-it under the New Hampshire Economic Poisons Law. We here refer to that discussion as to the nature of the question to be reviewed and the reasons why it is of such importance as to merit the attention of the Supreme Court. These reasons essentially result from the very common nature of the registration type of statute involved and the frequency with which jurisdiction questions arise with respect to foreign corporations (*supra* at 34 *et seq.*).

§6. THESE CASES PRESENT AN IMPORTANT QUESTION AS TO THE EXISTENCE OF AN INDEPENDENT BODY OF STATE LAW RELATIVE TO JURISDICTION OVER FOREIGN CORPORATIONS.

The nature of the question here referred to is discussed in Part III of this Argument *supra*. We here point out merely that the issue involved in one which is by no means necessarily restricted to these cases, nor even to cases under the New Hampshire statute with respect to service of process on foreign corporations, but could readily arise under similar statutes of many of the states where these statutes have not heretofore been the subject of extensive construction by the local Supreme Court.

V. CONCLUSION

In this Petition we have set forth to the Court certain important questions raised by the judgments of the Court of Appeals hereinbelow which we believe merit the review of the Supreme Court. These questions are not the only questions raised by the Court of Appeals decision, but they are essential questions

upon which we believe that the Court of Appeals committed error and with respect to which we believe that Supreme Court review is important. We so believe because as to these questions the errors committed are of significance which transcends the particular cases herein at issue and makes the Court of Appeals decision a potential authority for error on matters of broad importance.

The ultimate holding of the Court of Appeals herein that the District Court has jurisdiction of Nuodex on the facts of this case is itself a ruling of fundamental importance. Surely it cannot be questioned but that if allowed to stand, it will constitute a large advance toward the complete destruction of the principle of personal jurisdiction as applied to many American manufacturing enterprises which traditionally have been regarded as engaged solely in local enterprise and as selling in channels of interstate commerce. Certainly every one of them advertises to some extent in trade journals, publications and other media which may reach even the most remote jurisdiction, and equally clearly some one interested in promoting their sales may enter any state in the Union, whether as manufacturers representative, sales agent, distributor or otherwise. Is jurisdiction then to be sustained as to such a remote manufacturer whenever an action may arise in any foreign jurisdiction with which such contacts have been had? If "traditional notions of fairness" are indeed to be considered, we submit that the "quality and nature" of the nonresident's local contacts and whether they bear any relation to the doing of business "in an ordinary commercial sense" must be considered. Tested by such criteria, a foreign corporation cannot in reason be said to have been present and doing business locally on such facts as those of this case.

In the District Court, the finding was made that trial in New Hampshire would not be inconvenient to the parties (Appendix B *infra* at 64). This finding followed rulings by the District Court excluding certain evidence offered by Petitioner for the purpose of showing the existence of related litigation in Massachusetts which was offered as bearing upon the question of convenience and as tending with other relevant evidence to establish the inconvenience of a New Hampshire forum. In the Court of Appeals Petitioner contended that the District Court finding as to convenience was based upon clear error and was entitled to no

weight. Although no ruling was expressly made upon this point by the Court of Appeals, it is of interest that two of the three opinions filed in that Court rely in no way whatsoever upon plaintiff's claim of the convenience of a New Hampshire trial.[18]

Even if the finding of the District Court with respect to convenience be accepted, however, and regarded as relevant to the issues herein, Petitioner respectfully submits that such a finding cannot suffice to create personal jurisdiction where there is none otherwise, and that in these cases it cannot overcome the critical deficiencies in the jurisdictional evidence to establish under New Hampshire law that Petitioner was present and doing business locally "in a commercial sense," nor under federal constitutional law that Petitioner's contacts with the jurisdiction were of such quality and nature as to make it consistent with traditional notions of fair play and substantial justice to compel Nuodex to defend these cases in New Hampshire.

For all of the reasons hereinbefore stated, Petitioner respectfully submits that the Court of Appeals committed error in its judgments hereinbelow and that these judgments and the opinions accompanying them give rise to important questions meriting review by the Supreme Court. Wherefore, Petitioner respectfully prays that a writ of certiorari shall issue herein to the Court of Appeals of the First Circuit for review of the said judgments.

Respectfully submitted,

NUODEX PRODUCTS CO., INC.

By

George B. Rowell,

Frank J. Sulloway,

and

Gordon M. Tiffany

Its Attorneys

[18] The point is mentioned only in the concurring opinion of Circuit Judge Woodbury, Appendix A *infra*

(i)

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5182

W. H. Elliott & Sons Co., Inc.,

PLAINTIFF, APPELLANT,

v.

Nuodex Products Co., Inc.,

DEFENDANT, APPELLEE,

No. 5183

E. & F. King & Co., Incorporated

CROSS-CLAIMANT, APPELLANT,

v.

Nuodex Products Co., Inc.,

CROSS-DEFENDANT, APPELLEE.

Appeal from the United States District Court for the District of New Hampshire

[144 F. Supp. 401]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Stanley M. Brown, with whom *McLane, Carleton, Graf, Greene & Brown* was on brief, for W. H. Elliott & Sons Co., Inc.

Joseph S. Ransmeier, with whom *Sulloway, Jones, Hollis & Godfrey* was on brief, for Nuodex Products Co., Inc.

Robert W. Upton, with whom *Upton, Sanders & Upton* was on brief, for E. & F. King & Co., Incorporated.

OPINION OF THE COURT.

March 26, 1957.

HARTIGAN, *Circuit Judge*. These are appeals by the plaintiff-appellant, W. H. Elliott & Sons Co., Inc., and the cross-claimant-appellant, E. & F. King & Co., Incorporated, from orders of the United States District Court for the District of New Hampshire, entered on April 18, 1956 and October 25, 1956, quashing the return and dismissing the actions against the defendant and cross-defendant-appellee, Nuodex Products Co., Inc. Although appellants bring separate appeals from these orders, since they hinge on identical issues we will treat them in this opinion.

This is a civil action brought by W. H. Elliott & Sons Co., Inc., a New Hampshire corporation, hereinafter referred to as Elliott, against two foreign corporations, E. & F. King & Co., Incorporated, a Massachusetts corporation, hereinafter referred to as King, and Nuodex Products Co., Inc., a New York corporation, hereinafter referred to as Nuodex. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4(d)(3) and (7) of the Federal Rules of Civil Procedure in the mode prescribed by N. H. Rev. Stat. Ann. c. 300 § 11 (1955).[1] Venue for the district court was established by plaintiff's residence in New Hampshire.

Each defendant filed a motion to dismiss. King's motion, later waived, was on the ground that it was a foreign corporation, not doing business in the district of New Hampshire, and hence not subject to service of process there. Nuodex moved to dismiss upon two grounds, the first, that the complaint failed to state a

[1] In pertinent part this statute provides:

"Service of process * * * on a foreign corporation may be made * * *

* * *

(c) as otherwise provided by law. Whenever any foreign corporation authorized to transact, or transacting business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever service on any such registered agent cannot with reasonable diligence and promptness be made as above provided, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process or service of any notice or demand required or permitted by law to be served upon such corporation

claim upon which relief could be granted, and second, that Nuodex was a foreign corporation not doing business in New Hampshire and therefore not subject to service of process in that district. Upon a hearing on February 28, 1955, the court, in its order of March 29, 1955, denied the first ground of Nuodex' motion. Thereafter, beginning on October 26, 1955, a further hearing was held on the question of jurisdiction. Prior thereto, King answered to the merits and filed a cross-claim against Nuodex, alleging that Nuodex was doing business in New Hampshire and was subject to the jurisdiction of the court.

That hearing was limited to two issues: (1) whether Nuodex had waived its right to contest the question of jurisdiction by previously arguing and submitting for decision the issue of whether Elliott's complaint stated a claim upon which relief could be granted and (2) whether Nuodex was transacting business in New Hampshire so as to be subject to service of process there. These same two issues confront us on appeal.

Focusing our attention first upon the issue of waiver, it appears from the record that the district court on February 28, 1955 had a number of motions before it. These were King's and Nuodex' motions to dismiss, King's motion for extension of time to file answer and Elliott's motion for leave to take oral depositions. Elliott sought permission to take certain depositions in order to show that the two defendants, King and Nuodex, were doing business in New Hampshire. Since the court could not hear the branch of Nuodex' motion to dismiss based on the ground of lack of jurisdiction due to the depositions not yet obtained by Elliott, it agreed to hear first the branch of the motion to dismiss based on the ground that the complaint failed to state a claim for which recovery could be granted. The court stated to the attorneys present as follows:

> "* * * The only pending issue before me at the moment is whether the compaint states a cause or a claim upon which relief can be granted. The second part of the motion, that is, whether or not there is any jurisdiction, is deferred and not heard. The same runs in the same channel as yours does. We will hold that over."

On March 4, 1955 Nuodex filed a written memorandum in

support of its motion to dismiss for failure to state a claim. The introductory paragraph of this memorandum states:

> "1. Defendant Nuodex Products Co., Inc., has moved to dismiss the above-captioned action as to it on two grounds; first, failure of the complaint to state a claim upon which relief can be given, and second, lack of proper service of process and want of jurisdiction in this court. The present memorandum presents the law with respect to the first of the foregoing two grounds of its motion. In presenting it Defendant Nuodex Products Co., Inc. reserves its rights under the jurisdictional objection stated in its motion.
>
> * * * "

On March 29, 1955, the court entered the following order:

> "So much of defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted is denied. The remainder of the motion has not yet been heard."

On October 26, 1955 the court commenced hearing the branch of Nuodex' motion to dismiss based on lack of jurisdiction over it. By its opinion and order of April 18, 1956 the court quashed the return and dismissed Elliott's action on the ground that it did not have jurisdiction over Nuodex. Based on the same hearing, the court on October 25, 1956 dismissed King's cross-claim for the same reason.

The district court rejected Elliott's and King's contention, also maintained on appeal, that Nuodex, by submitting the first branch of its motion to dismiss on the ground that the complaint failed to state a claim, waived the question of jurisdiction in the second branch of its motion. In so doing the court said:

> "This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: 'Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the respective pleading thereto if one is required, except that

> the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted: * * * A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. * * *
>
> "The authorities seem to be in complete accord that the joining of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., supra, [13 F.R.D. 227 (N.D. Ill. 1952)] and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayheratz Amusement Corp., 3d Cir., 1944, 139 F.2d 871, 874, Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262-2264.

We agree with the district court on this point. Yet, we note that none of the cases brought to our attention contain the identical facts of the instant case. Here Nuodex, having joined in a motion its defenses of failure to state a claim and lack of jurisdiction, invoked an order of the court of March 29, 1955 on the sufficiency of the complaint.

It seems that the usual procedure would be for the trial court to decide the jurisdictional branch of such a motion first, since any judgment on the merits of the complaint would be a nullity upon a subsequent finding of no jurisdiction. But it is clear from the record in the instant case that the jurisdictional branch of the motion could not have been heard without certain depositions not yet obtained by Elliott. Further, in the opinion of the lower court trial convenience must have been served by a hearing on the first branch of the motion.

The record also disclosed that Nuodex effectively reserved its right to determine the jurisdiction portion of its motion, as appears from its statements to the court and its aforementioned memorandum. That the court recognized this reservation is evidenced by its order of March 29, 1955. Under such circumstances it can only be inferred that Nuodex was pursuing each ground of its motion to dismiss alternatively, and the order of the court

as to the first branch of the motion was intended to be final only upon a subsequent finding of jurisdiction. Therefore, we believe there was no waiver of jurisdiction by Nuodex on the facts of this case.

We turn next to the issue of whether Nuodex was transacting business in New Hampshire so as to be subject to service of process within the district. The pertinent facts may be stated as found by the district court:

> "The plaintiff in this action, [Elliott], is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, [King] and [Nuodex] are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Ada [sic], manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.
>
> "Nuodex is a manufacturer of special-purpose chemicals used by various industries, and has its usual place of business in New Jersey. As its products are essentially used by manufacturers, Nuodex does not ordinarily sell through the usual retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per-cent commission, and its soliciting personnel are its own employees who are paid directly by it.
>
> "Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex'

products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output including Super-Adit [sic], the product here complained of.

"On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric-treating problems. Nuodex' most overt act was to register some of its products under the terms of a New Hampshire statute. * * * " N. H. Rev. Stat. Ann. c. 438 § 3 (1955).[1]

After reviewing the above facts the district court held that Nuodex was not subject to service in the district of New Hampshire and accordingly ruled that "the return must be quashed and the action dismissed."

In so holding the court considered the test of "fair play and substantial justice," enunciated in *Internat. Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), and sought to apply it as

[1] It is a matter of record that Nuodex registered Super Ad-It, the product complained of here, under this statute both for industrial and retail sale in each of the years 1953, 1954, 1955. The statute provides:

"438:3 *Registration.* Every economic poison which is distributed, sold or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered in the office of the commissioner, and such registration shall be renewed annually. * * * "

adopted by the Supreme Court of New Hampshire in three cases: *LaBonte* v. *American Mercury Magazine, Inc.*, 98 N.H. 163, 96 A.2d 200 (1953), *Taylor* v. *Company*, 97 N.H. 517, 92 A.2d 910 (1952), *Grace* v. *Company*, 95 N.H. 74, 57 A.2d 619 (1948). In this manner, the court reasoned that, since the New Hampshire Supreme Court in the *LaBonte* and *Taylor* cases referred to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement", there is no jurisdiction in New Hampshire "unless this 'requirement' is met." The court's finding concerning this "requirement" was:

> "I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. . . ."

Having concluded that this "requirement" had not been met, the court held that it had no jurisdiction over Nuodex, notwithstanding that it found, as detailed in its opinion, the other "criteria" of the *International Shoe* case were fully satisfied.

On appeal Elliott and King contend that the district court erred in holding that the criterion or standard that the cause of action arise out of or be connected with activities within the state, presented in the *International Shoe* case, has been made a "requirement" by the New Hampshire Supreme Court. Rather, appellants assert that the New Hampshire Supreme Court looks upon all the *International Shoe* "standards" as limitations on the due process clause of the Fourteenth Amendment. If this contention were valid, then, under *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437 (1952), it would not be necessary in order for an action to be maintained against a foreign corporation for it to arise out of the activities of the corporation in the particular state.

Since we believe that the lower court erred in finding that Elliott's cause of action did not arise out of or was not connected with Nuodex' activities within New Hampshire, we need not decide whether the New Hampshire Supreme Court has made a "requirement" of this *International Shoe* "standard." However,

be it noted that the New Hampshire cases do not leave this question free from doubt.

It is fitting for us now to set forth the reasons that compel us to disagree with the learned district judge concerning the aforementioned finding.

Elliott claims that Super Ad-It, manufactured by Nuodex and sold by Litter to King and embodied by King in a paint sold by it to Elliott and thereafter used by Elliott, caused substantial damage to the latter's greenhouses in New Hampshire. Though the district court properly found that activities carried on in New Hampshire by Litter on behalf of Nuodex were continuous and systematic, it seems to have taken the view that, unless a direct solicitation or advertisement by Nuodex in New Hampshire either caused King to purchase Super Ad-It or caused Elliott to purchase King paint, the injury complained of here did not arise out of and was not connected with the activities of Nuodex in New Hampshire.

Contrary to the district court, we believe that such connection is demonstrated by Nuodex' industrial and retail registration of Super Ad-It under the New Hampshire Economic Poisons Law, set forth above, in 1953 and 1954. It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a "mixture of substances," such as King's paint. See N. H. Rev. Stat. Ann. c. 438 § 1 (1955). Therefore, the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen. Thus the damage complained of here "is accounted for only by the defendant's activities in New Hampshire." *Taylor v. Company*, supra at 521 and 913.

Moreover, it is vitally significant that Nuodex did much more than merely register its product in New Hampshire, as detailed in the lower court's opinion. The district court found that there was a continuous systematic course of business activity in the state by Nuodex through Litter. This activity included efforts to increase the sales of Super Ad-It in New Hampshire. Although the sale that resulted in the damage complained of here was made by Litter to King in Massachusetts, the record in addition

reveals that retail packages of Super Ad-It were getting into the state either by direct sales or other distribution routes. All these various methods of distributing the substance in question were part and parcel of Nuodex' over-all sales program.

In conclusion, as the district court suggested in its opinion, under New Hampshire law Nuodex can be held subject to service on account of the activity of its sales representative, Litter, notwithstanding that Litter was an independent corporation representing other companies besides Nuodex in the state. See *LaBonte* v. *American Mercury Magazine, Inc.*, supra. Neither does the fact that the activities of Litter largely constituted mere solicitation preclude service in this case. *Taylor* v. *Company*, supra. Nor do we believe that due process would be violated by holding Nuodex, a foreign corporation, subject to process where, as here, through sales managers it supervised the activities of Litter, its representative, and on at least one occasion joined with Litter to service an account in New Hampshire. The conclusion that Litter was to a certain extent under the direction of Nuodex in conducting the latter's sales program cannot be avoided on the facts of this case as detailed above and in the lower court's opinion.

For all the above reasons we conclude that Nuodex was subject to service in New Hampshire and that the district court had jurisdiction to entertain the action brought by Elliott, as plaintiff, and King, as cross-claimant.

A judgment will be entered vacating the orders of the district court and remanding the cases to that court for further consistent proceedings.

MAGRUDER, *Chief Judge* (concurring). I agree with Judge Hartigan's opinion to the effect that Nuodex cannot be held to have waived its objection to the jurisdiction. I also concur in Judge Hartigan's conclusion on the merits of the jurisdictional issue, though I am not sure that I would have put the matter just as he has done.

The basis of a state's personal jurisdiction over a foreign corporation has given rise to much dubious theorizing. On the foundation of "doing business" within a state, the earlier explanations of "implied consent" to the service of process, or of corporate "presence," have come to be recognized as fictitious forms of statement. Now it is fashionable to say that we must

consider the extent of the corporate activities manifested within the state to answer the query whether the exercise of personal jurisdiction over the foreign corporation would offend traditional notions of fair play and substantial justice—if it would, then the exercise of such personal jurisdiction is forbidden by the due process clause of the Fourteenth Amendment. See the discussion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Of course it is true that a state is free to impose additional "requirements" to the exercise of personal jurisdiction over foreign corporations, beyond the minimal requirements of the due process clause. However, I fail to find in the New Hampshire statute or in the New Hampshire court decisions any indication that New Hampshire has undertaken, as a matter of local law, to impose any such additional requirements. The important point is one of federal constitutional law, as the *International Shoe* case pointed out. That is to say, the manifested activities within the state by a foreign corporation may amount to a "doing business" of so continuous and systematic a nature as reasonably to permit the state to subject the foreign corporation to service of process with respect to any cause of action, wheresoever arising. On the other hand, a much lesser manifestation of activity within the state may, consistently with due process, justify a state to exercise personal jurisdiction over the foreign corporation, sued on a cause of action having some connection with or arising out of those activities within the state.

I doubt whether the underlying facts in the case at bar would warrant the ultimate conclusion that Nuodex was "doing business" within the State of New Hampshire of so continuous and systematic a character as to subject itself to the exercise of personal jurisdiction by the state on account of any and all causes of action, wheresoever arising. But as Judge Hartigan's opinion points out, Nuodex did make some efforts through a New Hampshire representative to promote the sales of its products in New Hampshire. The particular "Super Ad-It" which was alleged to have caused the harm in the present case was not sold by Nuodex in New Hampshire, but Nuodex in New Jersey put out in commerce a poisonous chemical, some of which it no doubt hoped and expected would eventually find its way into New Hampshire as an ingredient of paint products sold by others. That is what happened here; a salesman of codefendant King

sold to the plaintiff in New Hampshire some paint containing Nuodex Super Ad-It as an ingredient. This sale was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act. The subsequent use by the plaintiff of such paint product is alleged to have resulted in the tangible harm, inflicted in New Hampshire, upon the property of the plaintiff, a citizen of New Hampshire; and it is this tangible harm which is the subject of the cause of action now sued on. I have no doubt that under the Fourteenth Amendment the State of New Hampshire has power to subject the foreign corporation to a reasonable mode of personal service (as was the service here) in order to compel Nuodex to answer in the New Hampshire courts to the aforementioned local complaint. Cf. *Hess* v. *Pawloski*, 274 U.S. 352 (1927). If this complaint had been brought in a New Hampshire state court, service of process could have been made upon the Secretary of State, who would have had the duty, under the local statute, to give notice of the pendency of the cause of action to the foreign corporation. That being so, equivalent service of process is good under Rules 4(d)(3) and (7) of the Federal Rules of Civil Procedure.

WOODBURY, *Circuit Judge*, (concurring). I think it helpful to distinguish sharply between the two questions of law involved in cases like this: 1) the preliminary question to be decided by application of state law and, 2) the further question, if presented, to be decided by application of federal constitutional law. Judge Goodrich of the Court of Appeals for the Third Circuit sitting on this Court by assignment did this clearly and concisely in *Pulson* v. *American Rolling Mill Co.*, 170 F.2d 193, 194 (C.A. 1, 1948), wherein he said:

> "There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law; has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction

over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1, § 8, cl. 3; Amend 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation."

In the *Pulson* case we took the view that the applicable Massachusetts statute as interpreted by the Supreme Judicial Court of that Commonwealth was not broad enough, in view of the limited local activities of the foreign corporation there involved, to subject it to suit in Massachusetts. Thus in that case we did not reach the federal question of the limitation on state power imposed by the due process clause of the Fourteenth Amendment. I think the situation in New Hampshire is different. In my opinion the New Hampshire statute, unlike that of Massachusetts, has not been limited by judicial decision to restrict the scope of state power short of federal constitutional bounds.

Campbell v. *United States Radiator Corp.*, 86 N.H. 310 (1933), and *Grace* v. *Proctor & Gamble Co.*, 95 N.H. 74 (1948), certainly indicate unmistakably that in New Hampshire foreign corporations are subject to local jurisdiction up to the limits imposed upon state action by the due process clause of the Fourteenth Amendment. Perhaps some rather ambiguous language used in deciding the later cases of *Taylor* v. *Klenzade Products, Inc.*, 97 N.H. 517 (1952), and *LaBonte* v. *American Mercury Magazine, Inc.*, 98 N.H. 163 (1953), can be interpreted as casting some doubt upon the holding of the earlier *Campbell* and *Grace* cases. But in the later *Taylor* and *LaBonte* cases the court did not purport to overrule, indeed it did not even, except possibly by innuendo, cast doubt upon the holding of the earlier cases cited above. As I read the four cases together, I think it reasonably clear that New Hampshire has not departed from its original interpretation of the local statute as exerting jurisdiction over foreign corporations up to the constitutional limit. This, on my analysis, disposes of the question of state law and brings up the question of federal law, i.e. what limitation does the due process clause impose on the state in this regard?

The *International Shoe* case cited and discussed by my associates provides the answer to this question. In that case, as Chief Judge Magruder points out, the Court departed from the rationale of earlier cases and held that the test of due process in this context is whether the nature and extent of a foreign corporation's local activities are of sufficient extent to subject it to local jurisdiction without giving offense to "traditional notions of fair play and substantial justice."

I suggest that application of the test of "fair play and substantial justice" calls for reference to the specific interests in conflict in each particular case. Thus in this case I think we should weigh on the one hand the legitimate interests of the state, 1) in providing local access to compensation for wrongs done to its citizens, and, 2) in regulating potentially harmful activity within the state, as against, on the other hand, the legitimate interests of the foreign corporation relative, 1) to its reasonable expectations as to the laws and liabilities to which it was subjecting itself, and, 2) to its opportunity to defend itself without undue expense and inconvenience.

In this case the foreign corporation was promoting by sales force and advertising the use of its commercial poisons in the state of New Hampshire. And it registered its product under the New Hampshire Economic Poisons Law. Clearly then it not only hoped but also anticipated that its product would be used in the state. Furthermore, it certainly must have realized that the poisonous nature of its product created an appreciable risk of injury to persons in the state, even though the amount used, its value and the number of local users was relatively small. Under these circumstances I cannot think it unfair or unjust to subject the defendant to local jurisdiction. Furthermore, the factors enumerated indicate that the state's interest in subjecting the defendant to local jurisdiction is substantial.

It is true that there is no clear showing that the plaintiff's use of Super Ad-It was the result of the defendant's promotional activity in the state. But it does not logically follow that the fairness of exercising local jurisdiction over the defendant should be determined by the fortuitous factor of the plaintiff's state of mind when he bought the product. This factor relates more logically to fairness to the plaintiff of denial of jurisdiction. Rather the fairness to the foreign corporation is more logically

related to what it might reasonably have expected as a result of its local activities.

In this case the use of the defendant's product in New Hampshire was certainly expected by the defendant since it had actively promoted that use in the state. And it was hardly an unforeseeable consequence of that use that the defendant would incur local legal liabilities. These considerations, coupled with the District Court's finding that no undue inconvenience or expense would be cast upon the defendant in defending this action in New Hampshire, lead me to the conclusion that to subject it to local jurisdiction does no violence to "traditional notions of fair play and substantial justice."

APPENDIX B

Opinion of United States District Court For The District of New Hampshire

Civil Action No. 1465

W. H. Elliott & Sons Co., Inc.

v.

E. & F. King & Co., Incorporated

and

Nuodex Products Co., Inc.

April 18, 1956

(Reported at 144 F. Supp. 401)

* * * (Headnotes omitted)

CONNOR, District Judge.

This is a civil action brought by W. H. Elliott & Sons Co., Inc., against two foreign corporations, E. & F. King & Co., Incorporated and Nuodex Products Co., Inc. The complaint alleges two theories of recovery on separate counts, the first for negligence, and the second for breach of warranty. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4 (d) (3) and (7) of Federal Rules of Civil procedure 28 U. S. C. A. in the mode prescribed by the statutory

laws of this state. RSA 300:11. Venue for this court is established by the fact that the plaintiff is a resident of New Hampshire.

Each defendant filed a motion to dismiss, that of defendant King Company being on the sole ground that it was a foreign corporation, not doing business in the District of New Hampshire, and hence not subject to service of process here. This motion has been waived. The defendant Nuodex Products Co. moved to dismiss upon two grounds, the first, that the complaint failed to state a claim upon which relief could be granted, and second, that Nuodex is a foreign corporation, not doing business in the State of New Hampshire, and therefore not subject to service of process in this district. Upon hearing, the court denied the first part of the motion. A further hearing was had on the question of jurisdiction. Prior thereto, the defendant King Company answered to the merits, and filed a cross-claim against Nuodex, alleging that Nuodex was doing business within the state of New Hampshire and subject to the jurisdiction of this court.

The hearing was limited to two issues: (1) whether the defendant Nuodex was transacting business in New Hampshire so as to be subject to service of process within this district, and (2) whether the defendant Nuodex has waived its right to contest the question by previously arguing and submitting for decision the issue of whether the plaintiff states a claim upon which relief can be granted.

Findings of Fact

The plaintiff in this action, W. H. Elliott & Sons Co., Inc., hereinafter referred to as Elliott, is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, E. & F. King & Co., Incorporated, hereinafter referred to as King, and Nuodex Products Co., Inc., hereinafter referred to as Nuodex, are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Adit, manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.

Nuodex is a manufacturer of special-purpose chemicals and has its usual place of business in New Jersey. As its products

are used chiefly by manufacturers. Nuodex does not customarily sell through the retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per cent commission, and its soliciting personnel are its own employees who are paid directly by it.

Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex' products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output, including Super-Adit, the product here complained of.

On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance, Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric treating problems. Nuodex' most overt act was to register several of its products under the terms of a New Hampshire statute which provides that "it shall be unlawful for any

person to distribute, sell, or offer for sale within this state * * * any economic poison which has not been registered * * *." RSA 438:2.

The product here complained of, Super-Adit, was sold by Litter to King in Massachusetts. King subsequently added this product to a special paint which it was selling for use in greenhouses. While there is no evidence that Elliott purchased this paint directly from King, the present state of the pleadings discloses this to be so. Similarly, there is no evidence that either Nuodex or Litter sold it to the plaintiff, nor is such asserted in either the complaint or answer.

Conclusions and Rulings

[1, 3] The essential question here presented, whether a foreign corporation is subject to service of process, is one of substance. Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 7 Cir., 1952, 199 F.2d 485, 488. Since there is no federal statute applicable and this is a diversity case, it follows that the issue must be determined by state law, as in matters of substance this court is "in effect only another court of the State * * * ." Guaranty Trust Co. v. York, 326 U. S. 99, 108 65 S. Ct. 1464, 1469, 89L. Ed. 2079. Such is the rule of this circuit. Pulson v. American Rolling Mill Co., 1 Cir., 1948, 170 F.2d 193; Kelley v. Delaware, L. & W. R. Co., 1 Cir., 1948, 170 F.2d 195; see also Canvas Fabricators, Inc. v. Hooper & Sons Co. supra 199 F.2d 486; Olshansky v. Thyer Mfg. Corp., D.C. N.D. Ill., 1952, 13 F.R.D. 227, 230; Read v. Corbitt, D.C. E.D. Pa., 1950, 10 F.R.D. 125. And this position is further enforced by the fact that the validity of the service of process is predicated upon a state statute.

Despite the foregoing, it has been urged upon this court that this case is governed, not by local law, but by the rule laid down in International Shoe v. Washington, Office of Unemployment Compensation and Placement, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95. In that case, the Supreme Court, brushing aside the old distinctions of "presence" and "doing business," announced that due process now requires only that a foreign corporation maintain such minimum standards within the state which is asserting jurisdiction, so that "the maintenance of the suit does not offend 'traditional notions of fair play and sub-

stantial justice'." Id., 326 U.S. 316, 66 S.Ct. 158. In formulating this new "test", the Supreme Court was setting limitations upon state courts and was not defining the lengths to which a federal court must go in asserting jurisdiction over a foreign corporation. If International Shoe applies to federal courts at all, it applies when the federal court is expounding state law in a diversity case by laying down due process limitations upon the scope of its jurisdiction. A possible reason for the parties to the action urging an opposite view upon this court is found in the language of Grace v. Company, 95 N.H. 74, 57 A.2d 619, 621. There, the court quotes an earlier New Hampshire decision [Campbell v. United States Radiator Corp., 86 N.H. 310, 167A, 558] to the effect that the "question is one of federal law," and goes on to say that it considers "federal decisions as controlling rather than convincing." Id. 95 N.H. 76, 57 A.2d 621. This statement was taken to mean that federal law and not state law decides whether or not New Hampshire will exercise jurisdiction over a foreign corporation in a particular case. To accept the language as a statement of the law would be to ignore several other factors. First of all, the basic issue involved in all these cases is the scope of a state statute (in New Hampshire RSA 300:11), and except for the due process limitations placed on it by certain constitutional pronouncements like the International Shoe case, there hardly can be said to be any federal law on the question. Secondly, in a later case, Kenison, C. J., seems to have overruled any such interpretation of the language in Grace v. Proctor & Gamble Company, *supra*, when he pointed out that while "many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." Labonte v. American Mercury Magazine, Inc., 98 N.H. 163, 166, 96 A.2d 200, 202, 38 ALR 2d 742. Thirdly, the test laid down in International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra* must be considered in a case such as this, not because the federal constitutional limits upon the acquisition of jurisdiction by state courts as discussed in that case apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitional state law.

[4] Turning now to local law, it appears that the Supreme Court of New Hampshire has passed on the question of the power

to serve process upon foreign corporations only three times since the International Shoe case. Grace v. Proctor & Gamble Company, *supra*, Taylor v. Klenzade Products, Inc., 97 N.H. 517, 92 A.2d 910; La Bonte v. American Mercury Magazine, Inc., *supra*. In the first of these cases, the trial court, after reserving and transferring the question of jurisdiction over a foreign corporation, was directed to "be guided in its findings and ruling by International Shoe Co. v. Washington [Office of Unemployment Compensation and Placement], * * * ." Grace v. Proctor & Gamble Company, *supra*, 95 N.H. 77, 57 A.2d 621. As a result of this case, New Hampshire adopted the "reasonable and just" test Id., 95 N.H. 76, 57 A.2d 621, and all previous decisions must be considered as overruled.

[5] In laying down the test of "fair play and substantial justice the Supreme Court of the United States suggested several "criteria" or "standards" which could be used to measure the facts in each case: Some of these have been utilized by the local court in applying the above quoted test. Without losing sight of the basic principle that each case must be decided on its own facts, Favell-Utley Realty Co. v. Harbor Plywood Corp., D.C. N.D. Cal., 1950, 94 F. Supp. 96, 98, I feel that I should measure the facts of this case against these standards in reaching my decision.

[6] The first criteria suggested both by the Supreme Court of the United States and of New Hampshire, is whether the defendant's activities were "systematic and continuous." International Shoe v. Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 320, 66 S. Ct. 160; Taylor v. Klenzade Products, Inc., *supra*, 97 N.H. 519, 97 A.2d 912. The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to "sell everything for all the companies we represent." It is true that some federal cases have held that "mere solicitation" is not enough. Roberts v. Evans Case Co., 7 Cir., 1955, 218 F.2d 893; Johns v. Bay State Abrasive Products Co., D. C. Md., 1950, 89 F. Supp. 654. But these were based upon local law and not upon constitutional principles. On the other hand, Justice Rutledge has observed that no "business man would regard 'selling,' 'the taking of orders,' 'solicitation,' as not

'doing business'." Frene v. Louisville Cement Co., 1943, 77 U. S. App. D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926 Commenting upon this, Carter J., said: "We are in agreement with the conclusion reached by Justice Rutledge and the trend of the courts in the more recent cases that mere solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business." Perkins v. Louisville & N. R. Co., D.C. S.D. Cal. 1951, 94 F. Supp. 946, 951; see also, London's Inc. v. Mack Shirt Corp., D.C. Mass., 1953, 114 F. Supp. 883. This trend has met with local approval. In Taylor v. Klenzade Products, Inc., *supra*, the activity carried on in this state was very similar to that in the case at bar. There, the plaintiff, acting as agent for the defendant, sought out new dealers, helped to service established accounts, and attempted to stimulate new business for the defendant's products. In holding that the defendant was subject to the jurisdiction of New Hampshire courts, the court recognized that solicitation is an essential commercial activity. "Distribution can be made however only where a market exists, and a market in turn depends upon demand." Id. 97 N.H. 520, 92 A.2d 912. "In our judgment this activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state." Id., 97 N.H. 520, 92 A.2d 913.

[7, 8] Once accepting the proposition that solicitation is a commercial activity, recognized by New Hampshire as sufficient to constitute "transacting business" under New Hampshire RSA 300: 11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an "agent" of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In LaBonte v. American Mercury Magazine, Inc., *supra*, the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford Press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies beside Nuodex. Rumford Press printed many magazines other than the American Mercury.

Learned Hand, J., expressed what seems to me to be the best rule when he said: "* * * we cannot see that it was important that the agent worked for several principals." Bomze, et al. v. Nardis Sportswear, Inc., 2d Cir., 1948, 165 F.2d 33, 36.

[9] Whether or not it is a violation of due process to hold Nuodex subject to service on account of the activities of an independent corporation, and whether it is of consequence that Litter is not a New Hampshire corporation, are questions to be deferred until the other criteria or standards are resolved. Under the rule of this circuit, the question of due process "is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation." Pulson v. American Rolling Mill Co., *supra*, 170 F.2d 194.

[10] A second criterion or "standard" suggested by the Supreme Court of the United States and the Supreme Court of New Hampshire is to estimate the inconvenience "which would result to the corporation from a trial away from its 'home' or principal place of business." International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 317, 66 S. Ct. 158; cited and adopted in Taylor v. Klenzade Products, Inc., *supra*, 97 N. H. 519, 92 A.2d 912. In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here. Nuodex admits that it can be served with process in Massachusetts, and the few extra miles of travel to the district of the situs imposes no undue burden.

A third criterion suggested in International Shoe, 326 U.S. at page 319, 66 S. Ct. at page 159, is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. It appears that the local courts have not adopted this criterion, for nowhere is it discussed. But it could be observed that the defendant did take advantage of the provisions of New Hampshire RSA 438:3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the "exercise of that privilege may give rise to obligations * * *." International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 319, 66 S. Ct. at page 160.

[11, 12] The fourth criterion or standard suggested in the International Shoe case, 326 U. S. at page 319, 66 S. Ct. at page 160, is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the state. This test has been adopted by the Supreme Court of New Hampshire. Taylor v. Klenzade Products, Inc., *supra*, 97 N.H. 519, 521, 92 A.2d 912, 913; LaBonte v. American Mercury Magazine, Inc., *supra*, 98 N.H. 168, 96 A.2d 203. It probably is most clearly expressed in the Taylor case, where it was said: "It is not essential that the cause of action arise in New Hampshire, provided it arises out of business done here." See 97 N.H. at page 519, 92 A.2d at page 912. I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore, I conclude that this fourth "standard" is not met.

[13] This raises the question as to whether all of the standards or criteria must be present in order to confer jurisdiction. In International Shoe, Chief Justice Stone continually refers to these as criteria or "standards." (See 326 U. S. at pages 319, 320, 66 S. Ct. at pages 159, 160.) But the Supreme Court of New Hampshire, purporting to adopt the language in that case, refers to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement." Taylor v. Klenzade Products, Inc., *supra*, 97 N. H. 521, 92 A.2d 913; LaBonte v. American Mercury Magazine, Inc., *supra*, 98 N.H. 168, 96 A.2d 203. Therefore, it would seem that in New Hampshire there is no jurisdiction unless this "requirement" is met. It does not matter that the court might not have intended to be as strict as this language sounds. The Court of Appeals for this circuit has ruled that "Whether this be so or not we think it is no business for a federal court to meddle in. * * * We think it is the business of the federal court to follow the state court's construction of its own statute * * * until the state court announces a different rule." Pulson v. American Rolling Mill Co., *supra*, 170 F.2d 195. In the light of the state court's use of the word "require-

ment." I feel that I have no choice but to rule that this court lacks jurisdiction.

[14] Nor is there any merit in the argument that the state must grant jurisdiction if the federal limits of due process allow. "Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process." Missouri Pac. R. Co. v. Clarendon Boat Oar Co., 257 U. S. 533, 535, 42 S. Ct. 210, 211, 66 L. Ed. 354; Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 440, 72 S. Ct. 413, 96 L.Ed. 485.

[15] It is jointly urged by the plaintiff and the co-defendant that Nuodex, by submitting the first branch of its motion to dismiss* on the ground that the complainant fails to state a claim upon which relief can be granted, waived the question of jurisdiction raised in the second branch of its motion.

This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: "Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted, * * *. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. * * *."

The authorities seem to be in complete accord that the joining

*The motion: "Now comes the defendant Nuodex Products Co., Inc. and moves the Court as follows: (1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc. upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc. is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire."

of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., supra, and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayherstz Amusement Corp., 3 Cir., 1944, 139 F.2d 871, 874; Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262 - 2264.

Nuodex not being subject to service within this district, the return must be quashed and the action dismissed. An order will be so entered.

APPENDIX C

Constitutional Provisions, Statutes, and Rules Involved

1. *The United States Constitution, Amendments, Article XIV, §1*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Supreme Court Jurisdiction (28 U. S. C. §1254)*

"§1254. Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

3. *The Federal Diversity Statute (28 U.S.C. §1332)*

"§1332. Diversity of citizenship; amount in controversy

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds

the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States;

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) The word 'States', as used in this section, includes the Territories and the District of Columbia. June 25, 1948, c. 646, 62 Stat. 930."

4. *The Federal Venue Statute (28 U.S.C. §1391)*

"§1391. Venue generally

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district. June 25, 1948, c. 646, 62 Stat. 935."

5. *The Federal Rules of Civil Procedure, Rule 4 (d) (3) and 4 (d) (7)*

"Rule 4. Process

* * *

"(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *

"(3) Upon a domestic or foreign corporation or upon a

[1] So in original

partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

6. *The New Hampshire statute for service of process on foreign corporations (RSA 300:11)*

Service of Process

"300:11 How Made. Service of process in any suit, action or proceeding, or service of any notice or demand required or permitted by law to be served on a foreign corporation, may be made on such corporation as otherwise provided by law or by service thereof on the registered agent of such corporation. Service of any such process or of any such notice or demand upon a registered agent as registered agent may be made

"(a) by serving a copy thereof on its president, a vice president, the clerk, the secretary or an assistant clerk or an assistant secretary, if such registered agent is a corporation, or

"(b) by leaving an attested copy of such process, notice or demand in the registered office of the registered agent during regular business hours, or

"(c) as otherwise provided by law. Whenever any foreign corporation authorized to transact, or transacting business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or

service of any such notice or demand may be had, or whenever service on any such registered agent cannot with reasonable diligence and promptness be made as above provided, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process or service of any notice or demand required or permitted by law to be served upon such corporation."

7. *The New Hampshire Economic Poisons Laws (RSA438)*

438:1 Definitions.* For the purposes hereof the following words shall have the following meanings:

I. The term "economic poison" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner shall declare to be a pest.

II. The term "insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever.

III. The term "fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any fungi.

IV. The term "rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating rodents or any other vertebrate animal which the commissioner shall declare to be a pest.

V. The term "herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed.

VI. The term "insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class

* Subject to separability clause.

Insecta, comprising six-legged, usually winged forms, as, for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as, for example, spiders, mites, ticks, centipedes, and wood lice.

VII. The term "fungi" means all non-chlorophyll-bearing thallophytes (that is, all non-chlorophyll-bearing plants of a lower order than mosses and liverworts) as, for example, rusts, smuts, mildews, molds, yeasts, and bacteria, except those on or in living man or other animals.

VIII. The term "weed" means any plant which grows where not wanted.

IX. The term "ingredient statement" means either—(1) a statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the economic poison; or (2) a statement of the name of each active ingredient, together with the name of each and total percentage of the inert ingredients if any there be, in the economic poison (except option 1 shall apply if the preparation is highly toxic to man, determined as provided in section 9 of this chapter); and, in addition to (1) or (2) in case the economic poison contains arsenic in any form, a statement of the percentages of total and water soluble arsenic, each calculated as elemental arsenic.

X. The term "active ingredient" means an ingredient which will prevent, destroy, repel, or mitigate insects, fungi, rodents, weeds, or other pests.

XI. The term "inert ingredient" means an ingredient which is not an active ingredient.

XII. The term "antidote" means the most practical immediate treatment in case of poisoning and includes first aid treatment.

XIII. The term "commissioner" means the commissioner of agriculture.

XIV. The term "label" means the written, printed, or graphic matter on, or attached to, the economic poison, or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, of the economic poison.

XV. The term "labeling" means all labels and other writ-

ten, printed, or graphic matter (1) upon the economic poison or any of its containers or wrappers; (2) accompanying the economic poison at any time; (3) to which reference is made on the label or in literature accompanying the economic poison, except when accurate, non-misleading reference is made to current official publications of the United States department of agriculture or interior, the United States public health service, state experiment stations, New Hampshire University, or any other similar federal institutions or official agencies of this state or other states authorized by law to conduct research in the field of economic poisons.

XVI. The term "adulterated" shall apply to any economic poison if its strength or purity falls below the professed standard or quality as expressed on labeling or under which it is sold, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent of the article has been wholly or in part abstracted.

XVII. The term "misbranded" shall apply

(1) to any economic poison if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

(2) to any economic poison

(a) if it is an imitation of or is offered for sale under the name of another economic poison;

(b) if the labeling accompanying it does not contain instructions for use which are necessary and, if complied with, adequate for the protection of the public;

(c) if its labeling bears any reference to registration hereunder;

(d) if the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals;

(e) if the label does not bear an ingredient statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient statement on the immediate container can be clearly read, of the retail package which is presented or displayed under customary conditions of purchase;

(f) if any word, statement, or other information required by or under the authority hereof to appear on the labeling is not prominently placed thereon with such conspicuousness as, compared with other words, statements, designs, or graphic matter in the labeling and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; or

(g) if in the case of an insecticide, rodenticide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized practice, it shall be injurious to living man or other vertebrate animals or vegetation, except weeds, to which it is applied, or to the person applying such economic poison.

SOURCE: 1949, 311:1 par. 1, eff. Jan. 1, 1950.

438:2 Prohibited Acts.*

I. It shall be unlawful for any person to distribute, sell or offer for sale within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

(1) Any economic poison which has not been registered pursuant to the provisions of section 3 hereof, or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in connection with its registration; provided, that in the discretion of the commissioner, a change in the labeling or formula of an economic poison may be made within a registration period without requiring re-registration of the product.

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing

(a) the name and address of the manufacturer, registrant, or person for whom manufactured;

* Subject to separability clause

(b) the name, brand, or trade-mark under which said article is sold; and

(c) the net weight or measure of the content subject, however, to such reasonable variations as the commissioner may permit.

(3) Any economic poison which contains any substance in quantities highly toxic to man, determined as provided in section 9 hereof, unless the label shall bear, in addition to any other matter required hereby,

(a) the skull and crossbones;

(b) the word "poison" prominently, in red, on a background of distinctly contrasting color; and

(c) a statement of an antidote for the economic poison.

(4) The economic poisons commonly known as standard lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosilicate, or barium fluosilicate unless they have been distinctly colored or discolored as provided by regulations issued in accordance herewith, or any other white powder economic poison which the commissioner, after investigation of and after public hearing on the necessity for such action for the protection of the public health and the feasibility of such coloration or discoloration, shall, by regulation, require to be distinctly colored or discolored; unless it has been so colored or discolored; provided, that the commissioner may exempt any economic poison to the extent that it is intended for a particular use or uses from the coloring or discoloring required or authorized by this section if he determines that such coloring or discoloring for such use or uses is not necessary for the protection of the public health.

(5) Any economic poison which is adulterated or misbranded.

II. It shall be unlawful for any person to detach, alter, deface or destroy, in whole or in part, any label or labeling provided for herein, or regulations promulgated hereunder; or to add any substance to, or take any substance from, an economic poison in a manner that may defeat the purpose hereof.

111. It shall be unlawful for any person to use for his own advantage or to reveal, other than to the commissioner or proper officials or employees of the state or to the courts of this state in response to a subpoena, or to physicians, or in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, any information relative to formulas of products acquired by authority hereof.

SOURCE: 1949, 311:1 par. 2, eff. Jan. 1, 1950.

438:3 Registration.* Every economic poison which is distributed, sold or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered in the office of the commissioner, and such registration shall be renewed annually; provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison; and additional names and labels shall be added by supplement statements during the current period of registration.

SOURCE: 1949, 311:1 par. 3, eff. Jan. 1, 1950.

438:4 Exception.* Notwithstanding any other provisions hereof, registration is not required in the case of an economic poison shipped from one plant within this state to another plant within this state operated by the same person.

SOURCE: 1949, 311:1 par. 8, eff. Jan. 1, 1950.

438:5—Statement Required.* The registrant shall file with the commissioner a statement including (1) the name and address of the registrant and the name and address of the person whose name will appear on the label, if other than the registrant; (2) the name of the economic poison; (3) a complete copy of the labeling accompanying the economic poison and a statement of all claims to be made for it including directions for use; and (4) if requested by the commissioner a full description of the tests made and the results thereof upon which the claims are based. In the case of renewal of registration, a statement shall be re-

* Subject to separability clause.

quired only with respect to information which is different from that furnished when the economic poison was registered or last re-registered.

SOURCES: 1915, 118:2. PL 185:2. RL 227:2. 1949, 311:1 par. 4, eff. Jan. 1, 1950.

438:6—Fees.* The registrant shall pay an annual fee of ten dollars for each economic poison registered, provided, however, that any registrant may register annually any number of brands upon the payment of an annual fee of one hundred dollars. A sum not to exceed three thousand dollars annually from said fees shall be held in the state treasury in a special fund to be used only for carrying out the provisions hereof. The monies in said special fund shall not lapse but may be used at any time for carrying out the provisions hereof. Any excess above three thousand dollars annually which may be collected from fees under the provision of this section shall be credited to the general funds.

SOURCES: 1915, 118:2. PL 185:2. RL 227:2. 1949, 311:1 par. 5, eff. Jan. 1, 1950.

438:7 Submission of Formula.* The commissioner, whenever he deems it necessary in the administration hereof may require the submission of the complete formula of any economic poison. If it appears to the commissioner that the composition of the article is such as to warrant the proposed claims for it and if the article and its labeling and other material required to be submitted comply with the requirements of section 2 hereof, he shall register the article.

SOURCE: 1949, 311:1 par. 6, eff. Jan. 1, 1950.

438:8 Corrections before Registration.* If it does not appear to the commissioner that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of this chapter, he shall notify the registrant of the manner in which the article labeling, or other material required to be submitted fail to comply with the chapter so as to afford the registrant an opportunity to make the necessary corrections. If,

* Subject to separability clause

upon receipt of such notice, the registrant insists that such corrections are not necessary and requests in writing that the article be registered, the commissioner shall register the article, under protest, and such registration shall be accompanied by a warning, in writing, to the registrant of the apparent failure of the article to comply with the provisions of the chapter. In order to protect the public, the commissioner, on his own motion, may at any time, cancel the registration of an economic poison and in lieu thereof issue a registration under protest in accordance with the foregoing procedure. In no event shall registration of an article, whether or not protested, be construed as a defense for the commission of any offense prohibited under section 2 of this chapter.

SOURCE: 1949, 311:1 par. 7, eff. Jan. 1, 1950.

438:9 Powers of Commissioner.* The commissioner is authorized, after opportunity for a hearing (1) to declare as a pest any form of plant or animal life or virus which is injurious to plants, men, domestic animals, articles or substances; (2) to determine whether economic poisons are highly toxic to man; and (3) to determine standards of coloring or discoloring for economic poisons, and to subject economic poisons to the requirements of paragraph I (4) of section 2 hereof.

SOURCE: 1949, 311:1 par. 9, eff. Jan. 1, 1950.

438:10 Rules and Regulations.* The commissioner is authorized to make necessary rules and regulations for carrying out the provisions hereof, including rules and regulations providing for the collection and examination of samples of economic poisons.

SOURCE: 1949, 311:1 par. 10, eff. Jan. 1, 1950.

438:11 Adoption of Federal Rules.* In order to avoid confusion endangering the public health, resulting from diverse requirements, particularly as to the labeling and coloring of economic poisons, to avoid increased costs to the people of this state due to the necessity of complying with such diverse requirements in the manufacture and sale of such poisons, and to secure uniformity between the requirements of the several states and the federal government relating to such poisons, the commissioner is authorized, after due public hearing, to adopt by

* Subject to separability clause.

regulation such regulations, applicable to and in conformity with the primary standards established hereby, as have been or may be prescribed in the United States department of agriculture with respect to economic poisons.

SOURCE: 1949, 311:1 par. 11, eff. Jan. 1, 1950.

438:12 Enforcement.* The examination of economic poisons shall be made under the direction of the commissioner for the purpose of determining whether they comply with the requirements hereof. If it shall appear from such examination that an economic poison fails to comply with the provisions hereof, and the commissioner contemplates instituting criminal proceedings against any person, the commissioner shall cause appropriate notice to be given to such person. Any person so notified shall be given an opportunity to present his views, either orally or in writing, with regard to such contemplated proceedings and if thereafter in the opinion of the commissioner it shall appear that the provisions hereof have been violated by such person, then the commissioner shall refer the facts to the county solicitor for the county in which the violation shall have occurred with a copy of the results of the analysis or the examination of such article; provided, however, that nothing herein shall be construed as requiring the commissioner to report for prosecution or for the institution of libel proceedings minor violations hereof whenever he believes that the public interests will be best served by a suitable notice of warning in writing. It shall be the duty of each county solicitor to whom any such violation is reported to cause appropriate proceedings to be instituted and prosecuted without delay.

SOURCE: 1949, 311:1 par. 12, eff. Jan. 1, 1950.

438:13 Exemptions.* The penalties provided for violations of paragraph I of section 2 shall not apply to (1) any carrier while lawfully engaged in transporting an economic poison within this state, if such carrier shall, upon request, permit the commissioner or his designated agent to copy all records showing the transactions in and movement of the articles; (2) public officials of this state and the federal government engaged in the performance of their official duties; (3) the manufacturer or shipper of an

* Subject to separability clause.

economic poison for experimental use only by or under supervision of an agency of this state or of the federal government authorized by law to conduct research in the field of economic poisons, or by others if the economic poison is not sold and if the container thereof is plainly and conspicuously marked "For experimental use only Not to be sold," together with the manufacturer's name and address; provided, however, that if a written permit has been obtained from the commissioner, economic poisons may be sold for experiment purposes subject to such restrictions and conditions as may be set forth in the permit.

SOURCE: 1949, 311:1 par. 13, eff. Jan. 1, 1950.

438:14 Export.* No article shall be deemed in violation hereof when intended solely for export to a foreign country, and when prepared or packed according to the specifications or directions of the purchaser. If not so exported, the provisions shall apply.

SOURCE: 1949, 311:1 par. 14, eff. Jan. 1, 1950.

438:15 Penalties.*

I. Any person violating any of the provisions hereof shall be fined not more than one hundred dollars for the first offense and for a second offense within a period of three years shall be fined not less than one hundred dollars nor more than five hundred dollars.

II. Notwithstanding any other provisions of this section, any person, with intent to defraud, who uses or reveals information relative to formulas of products acquired under authority hereof shall be fined not more than one hundred dollars or imprisoned for not more than one year, or both.

SOURCE: 1949, 311:1 par. 15, eff. Jan. 1, 1950.

438:16 Seizures; Forfeiture.* Any economic poison that is distributed, sold, or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be liable to be proceeded against in any court in any county of the state where it may be found and seized for forfeiture as provided by chapter 617, RSA.

(1) if it is adulterated or misbranded;

* Subject to separability clause.

(2) if it has not been registered under the provisions of section 3;

(3) if it fails to bear on its label the information required hereby;

(4) if it is a white powder economic poison and is not colored as required hereunder.

SOURCE: 1949, 311:1 par. 16, eff. Jan. 1, 1950.

438:17 Cooperation.* The commissioner is authorized and empowered to cooperate with, and enter into agreements with, any other agency of this state, the United States department of agriculture, and any other state or agency thereof for the purpose of carrying out the provisions hereof and securing uniformity of regulations.

SOURCE: 1949, 311:1 par. 17, eff. Jan. 1, 1950.

* Subject to separability clause.